Supreme Court, U.S.
FILED

NO. 931441 MAR 15 1994

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

RICHARD M. WALSH,

PETITIONER,

v.

STATE OF DELAWARE,
MICHAEL N. CASTLE AND THE
DEPARTMENT OF MILITARY
AFFAIRS,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

RICHARD M. WALSH, PRO SE
2209 PENNINGTON DRIVE
WILMINGTON, DE 19810
(302) 475-3697

85 pp

QUESTIONS PRESENTED

1. Whether this Court's decision in Patsy v. Board of Regents, 457 U.S. 496 (1982) can be properly cited as the basis to preclude exhaustion as a requirement regarding remedies in the Federal administrative appeals system provided by the Army Board for Correction of Military Records (ABCMR)?

2. Whether a willful age discrimination cause of action filed within three years from the date the cause of action accrued is time barred when the statute of limitations specified in 29 U.S.C. 626 (e)(1) prior to its 21 November 1991 amendment and 29 U.S.C. 255 (a) is applicable?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	(i)
TABLE OF AUTHORITIES	(iii)
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	17
1. Decision below conflicts with those in other Circuits and within the same Circuit, and decides a Federal question in a way that conflicts with applicable decision of this Court.	17
2. Decision below is arithmetically incorrect.	32
CONCLUSION	34
APPENDIX	36
APPENDIX A : Judgment Affirmed, No Opinion	
APPENDIX B : Reargument Denied with Opinion	
APPENDIX C : Dismissal Granted	
APPENDIX D : Rehearing Denied	
APPENDIX E : Motion for Rehearing, En Banc Suggested	

TABLE OF AUTHORITIES

CASES	Pages
First Jersey Securities v. Bergen, 605 F.2d 690 (3rd Cir.1979)	32
Hodges v. Callaway, 499 F.2d 417 (5th Cir.(1974)	23
Johnson v. Orr, 780 F.2d 386 (3rd Cir. 1986)	15
Jorden v. National Guard Bureau, 799 F.2d 99 (3rd Cir. 1986)	16, 17, 25, 26, 29, 30, 31
Karr v. Carper, U.S. DIST. CT., DIST OF Delaware, CA 88-466 MMS Unreported Opinion (31 March 1993)	14, 17, 27, 28, 29, 30, 31
McCurdy v. Zuckert, 359 F.2d 491 (5th Cir. 1966)	24
Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938)	31
Navas v. Vales, 752 F.2d 765 (1st Cir. 1985)	20, 23, 27, 31
Patsy v. Board of Regents, 457 U.S 496 (1982)	i, 12, 14, 19

	Page
Penagaricano v. Llenza, 747 F.2d 55 (1st Cir. 1985)	14, 22, 23
Williams v. Wilson, 762 F.2d 357 (4th Cir. 1985)	14, 22, 27, 31

CODIFIED UNITED STATES STATUTES

28 U.S.C. Section 1254 (1)	3
29 U.S.C. Section 255 (a)	i, 3, 11
29 U.S.C. Section 621	10
29 U.S.C. Section 626 (e)(1), Prior to 21 Nov 91 Amend.	i, 3, 11, 32

FEDERAL RULES OF CIVIL PROCEDURE

Rule 12. (b) (6)	10

CODIFIED DELAWARE STATUTE

Delaware Code Ann., Title 10, Section 8119	10

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

NO._____

RICHARD M. WALSH,

Petitioner,

v.

THE STATE OF DELAWARE,
MICHAEL N. CASTLE AND THE
DEPARTMENT OF MILITARY AFFAIRS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

Petitioner, Richard M. Walsh, respectfully requests that a writ of certiorari issue to review the Judgment Order of the United States Court of Appeals for the Third Circuit

OPINIONS BELOW

The Order of the United States Court of

Appeals for the Third Circuit without opinion dated 19 November 1993 affirming the Judgment of the District Court entered 6 May 1993 (dated 5 May 93) appears in Appendix A.

The unreported Opinion of the United States District Court, District of Delaware, dated 5 May 1993 denying Plaintiff's Motion for Reargument appears in Appendix B.

The unreported Opinion of the United States District Court, District of Delaware, dated 30 December 1992 granting Defendants' Motion to Dismiss appears in Appendix C.

The Order of the United States Court of Appeals for the Third Circuit dated 16 December 1993 denying Petitioner's Motion for Rehearing and Suggestion for Rehearing En Banc Appears in Appendix D.

STATEMENT OF JURISDICTION

The Judgment Order of the United States Court of Appeals for the Third Circuit, affirming the District Court's denial of

Plaintiff's Motion for Reargument and dismissal of the case was entered on 19 November 1993.

Petitioner's subsequent Motion for Rehearing and Suggestion for Rehearing En Banc was denied by the United States Court of Appeals for the Third Circuit on 16 December 1993.

The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Age Discrimination in Employment Act of 1967, 29 U.S.C. sec. 626(e)(1) prior to 21 November 1991 amendment reads:

"Sections 6 and 10 of the Portal-to-Portal Act of 1947 (29 USCS sections 255 and 259) shall apply to actions under this Act."

The Portal-to-Portal Act of 1947, 29 U.S.C. 255(a) reads:

"if the cause of action accrues on or after the date of the enactment of this Act (May 14, 1947)- may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued;"

STATEMENT OF THE CASE

1. On 22 May 1992, Mr. Walsh filed suit in the United States District Court, District of Delaware, well within the two years after receiving notification on 3 December 1990 from the Department of the Army, to whom the Delaware Department of Justice had initially directed Walsh for relief in this matter, that Mr. Walsh had "exhausted his opportunity for relief within the Army's administrative appeals system" and that his

"only recourse now is a Federal Court of competent jurisdiction."

a. Mr. Walsh filed pro se when he could find no competent attorney in the small state of Delaware who did not claim conflict of interest, too busy or lack of expertise in military law in this case, apparently perceived to be very politically sensitive. When such an attorney was finally found in Pennsylvania, he later had to withdraw unexpectedly when a job was offered and accepted in the U.S. Department of Justice.

2. In his suit, Walsh alleged that:

a. The Adjutant General/Delaware National Guard (DNG), a cabinet appointee reporting directly to the Governor, manipulated the DNG general officer selection and promotion process in gross violation of statutes and regulations thereby denying Walsh promotion to a general

officer position for which official records showed him to have been by a wide margin "best qualified", as required by regulations; thus, absent promotion, causing Walsh to be separated nine years prematurely from both the Delaware and the United States Army National Guards in which he held dual memberships. The Adjutant General/DNG then immediately certified his blatantly unqualified crony to the National Guard Bureau as being qualified for both promotion to the general officer position he had illegally denied Walsh and the required Federal Recognition in the Army National Guard of the United States (ARNGUS);

b. The Governor of Delaware, also Commander-in-Chief/DNG, in order to cover-up the wrongdoing as well as his own inaction having had prior knowledge of it and thereby preclude serious political embarrassment, knowingly and maliciously contrived and

disseminated false information in order to justify denying Walsh's direct appeal to the Governor for his immediate reinstatement in the DNG in the general officer position his Adjutant General's unqualified crony had been forced to vacate when the National Guard Bureau officially notified the State by letter not only denying the required Federal Recognition in the U.S. Army National Guard for the promotion of the Adjutant General's unqualified crony, but also finding him "unacceptable for retention in the Army National Guard in accordance with regulations"; and,

c. The above Governor's Lt. Governor and immediate successor as Governor and CINC/DNG continued the cover-up begun by his predecessor until confronted with a "Blue Book" documenting detailed evidence of the wrong doing and cover-up that the "new" Governor could not refute after its

extensive review, corroboration and subsequent validation by both the Governor's own legal staff and independently by an outside attorney-friend of both Governors.

(1) Realizing his own involvement in the cover-up and the potential for serious political embarrassment, the "new" Governor then deliberately delayed advising Walsh of the results of the "Blue Book" review until just two weeks before Walsh's 59th birthday when the reasonable expectation was raised that, because of the proven wrongdoing, there would be changes in the DNG, including Walsh's reinstatement, after the "new" Governor's expected reelection six weeks hence. The Governor was reelected and the resignation of his Adjutant General, who had wrongfully manipulated the regulated selection process and been carried over from the previous Governor's administration, was announced immediately after the election.

(2) Walsh however, was subsequently notified through the Governor's newly appointed Adjutant General that regulations prohibit promotion of officers to General Officer rank "at age 59 years plus" and then falsely assured that every avenue available had been exhausted in an effort to reinstate Walsh and that "there is nothing further that can, nor will, be done" --- while knowing full well the latter to have been a blatant and subsequently proven lie to preclude the political embarrassment that would have otherwise accrued to the Governor when the evidence of wrongdoing and cover-up was finally exposed during the Federal Recognition hearing that would have been necessary for Walsh's reinstatement; thus leaving only a deliberately crafted case of willful age discrimination in its wake.

3. On 28 September 1992, the Delaware Department of Justice representing the

Defendants moved to dismiss, alleging that the suit was barred pursuant to Fed. R. Civ. P. 12(b) (6).

4. On 30 December 1992, the District Court granted the State's motion to dismiss, finding that none of Walsh's first five of six causes of action accrued on or after 22 May 1990 and were therefore time barred based on 2 year statute of limitations under Del. Code. Ann., title 10, section 8119; and finding that Walsh's sixth and last cause of action accrued on 23 May 1989 and was therefore also time barred based on a 90 day statute of limitations under 29 U.S.C. 621 et al.

5. On 11 January 1993, Walsh moved for reargument respectfully pointing out as follows:

a. that the two year statute of limitations applied by the District Court to Walsh's first five causes of action was

tolled until 3 December 1990 when Walsh was officially notified that he "has exhausted his opportunity for relief within the Army's administrative appeals system" and advised that his "only recourse now is in a Federal Court of competent jurisdiction"; and,

b. regarding Walsh's sixth cause of action, that the applicable statute of limitations in effect prior to amendment 21 Nov 91, as reflected in EEOC'S 31 January 90 letter to Walsh, was two years after the cause of action, or three years if the violation was willful. (29U.S.C.626 (prior to 21 November 1991 Amendment), 29U.S.C.255).

6. On 5 May 1993, the District Court denied Walsh's Motion for Reargument. (Pertinent details at para. 7 below).

7. On 27 May 1993, Walsh filed a Notice of Appeal and on 7 August 1993 an "Informal Brief" to the United States Court of Appeals

for the Third Circuit. Pursuant to the "Informal Brief" format provided by the Court of Appeals, Walsh answered the following two questions:

a. Did the District Court incorrectly decide the facts of your case? YES. If so, what facts?

(1) Regarding Walsh's first five of six alleged causes of action: The fact that the two year statute of limitations applicable to Walsh's first five civil rights causes of action was tolled until he exhausted his administrative appeals was incorrectly decided by the District Court to be the opposite.

(a) The District Court's rationale, that "Plaintiff (Walsh) is not required to exhaust state administrative remedies prior to initiating a civil rights suit in federal court", which the Court supported by citing Patsy v. Board of

Regents, 457U.S.496 (1982) relating exclusively to state administrative remedies (App. B-7), is apparently based on the Court's mistake of fact that the Army's administrative appeals system (ABCMR: Army Board for Correction of Military Records) which was officially exhausted in the present case on 3 December 1990, is actually a Federal, not State, appeals system having the potential to provide a fully adequate remedy in the present case in accordance with the established position of the Third Circuit Court of Appeals on the matter. (Para. 9.b. below).

(2) Regarding Walsh's sixth cause of action: The District Court first found correctly that Walsh's willful age discrimination cause of action accrued on 23 May 1989 and that Walsh's Complaint had been filed on 22 May 1992; however, when the Court applied the correct three year statute

of limitations, instead of the previously incorrect 90 days, later agreed to have been an error of law committed by the Court, to the time period defined by those two dates, the Court incorrectly concluded that Walsh's willful age discrimination cause of action was still time barred. (App. B-2,9).

b. Did the District Court apply the wrong law (either cases or statutes)? YES.

(1) Regarding the alleged misapplication (at para. 7.a.(1) above) of Patsy v. Board of Regents, 457 U.S. 496 (1982), the applicable cases would be Karr v. Carper, United States District Court, District of Delaware, CA88-466 MMS, Unreported Opinion (31 March 1993); Penagaricano v. Llenza, 747 F.2d55,57 (1st Cir. 1984); and Williams v. Wilson, 762 F. 2d 357, 360n.6 (4th Cir. 1985).

8. On 19 November 1993, the United States Court of Appeals for the Third Circuit by

Judgment Order affirmed the District Court's Judgment entered on 6 (5) May 1993. The Court of Appeals issued no opinion with its Judgment Order. (App. A).

9. On 3 December 1993, Walsh filed a Motion for Rehearing with Suggestion for Rehearing En Banc which is reproduced in Appendix E. In that petition, Walsh respectfully pointed out and discussed the following at para.2.b & c. beginning on page E-4:

a. The common misapprehension to think of the "National Guard" as being strictly a State organization when in fact it has an "unusual 'hybrid' status as an agency with both Federal and State characteristics", Johnson v. Orr, 780 F. 2d 386, 388 (3rd Cir. 1986);

b. The critical importance of either the presence or absence of State control --- depending on whether or not the State Guard

member is also a full-time Guard employee holding a civilian technician position controlled by the State and requiring continued State Guard membership, or a Guard member employed full-time in the Active Guard/Reserve (AGR) program controlled by the State, or simply a part-time citizen soldier with a Federally Recognized dual membership in the Army (or Air) National Guard of the United States (ARNGUS) which the vast majority of Guard members are and Walsh was in the present case --- in making the correct determination in each case as to whether or not there is the "potential adequacy of that remedy in the particular case" necessary to require exhaustion under the approach taken by the United States Court of Appeals for the Third Circuit "which favors exhaustion but does not require it where the administrative remedy would be inadequate," Jorden v. National

Guard Bureau, 799F.2d 99, 102 n.5. (3rd Cir 1986); and,

c. The critical difference between the present case and both the Jorden case cited immediately above, and Karr v. Carper, United States District Court, District of Delaware, CA 88-466 MMS, Unreported Opinion (31 March 1993), because of the overriding characteristic of State control in Jorden (a full-time civilian technician) and in Karr (a full-time AGR employee) compared to its absence in the present case (Walsh part-time citizen soldier with Federal Recognition and dual membership in the Army National Guard of the United States).

10. On 16 December 1993, the United States Court of Appeals for the Third Circuit denied Walsh's Motion for Rehearing.

REASONS FOR GRANTING THE WRIT

1. This case presents an opportunity for this Court to resolve a conflict, regarding

the "Doctrine of Exhaustion of Remedies," between the exhaustion decision of the United States Court of Appeals for the Third Circuit in the present case and decisions on the same matter in other Circuits, as well as previous exhaustion decisions and current exhaustion policy within the Third Circuit itself; and if allowed to stand, the decision in the present case will also result in a conflict between it and another recent exhaustion decision in the United States District Court for the District of Delaware. Finally, the decision petitioned herein for review decided a Federal question in a way that conflicts with an applicable decision of this Court. Review and resolution by this Court is necessary in order to secure and assure uniformity of decisions and is therefore of general importance throughout our entire justice system and to the public it serves.

a. The United States Court of Appeals for the Third Circuit, by affirming without opinion the 5 May 93 decision of the District Court in the present case, held that the 2 year statute of limitations applicable to Walsh's first five of six civil rights causes of action, none of which accrued on or after 22 May 90, was not tolled until Walsh exhausted his Federal administrative appeals on 3 Dec. 90 based on the following from the District Court's 5 May 93 Opinion reproduced as Appendix B : " generally a plaintiff is not required to exhaust State remedies prior to initiating a civil rights suit in federal court. Patsy v. Board of Regents, 457 U.S. 496 (1982)." (App. B-7).

(1) Since the administrative appeals system was Federal and not State, Walsh identified the above basis and citation as errors of apprehension and of law,

respectively, both in his initial Informal Brief, as reported above in "Statement of the Case," para. 7.a.(1) and 7.b.(1), as well as in his Motion for Rehearing, reproduced as Appendix E, at page E-4, Para. 2.b.

(2) However, aside from the confusion caused by those suggested errors of apprehension and of law, the conflicting core decision of the District Court affirmed by the Court of Appeals remains that Walsh was not required to exhaust his Federal administrative appeals before filing in Federal Court and is therefore time barred.

b. Following is just a sample of the conflicts with exhaustion decisions in other Circuits if the decision in the present case is left intact:

(1) First Circuit; Navas v. Vales, 752 F.2d 765, 766, 770, 771 (1st Cir. 1985). The Court of Appeals held that the claim

that the Selective Retention Board violated military regulations was not justiciable where former officer had not availed himself of review mechanism provided by the Army Board Correction of Military Records (ABCMR).

(a) "Navas also claims that because the ABCMR cannot give him complete relief, he should not be required to appeal to that Board before pursuing judicial remedies."

(b) The Court responded that "the ABCMR cannot compel the Puerto Rico National Guard to reinstate Navas, but it can correct Navas' record to show that he is eligible for reinstatement in the PRNG. The ABCMR is also empowered to provide Navas with substantial relief by reinstating him in active federal reserve status and ordering the payment of all pay an allowances lost as a consequence of a wrongful separation."

Penagaricano v. Llenza, 747 F.2d 55,57 (1st Cir. 1984).

(c) "Our decision today is consonant with the general rule that 'military personnel with grievances against the military establishment or its personnel must exhaust the administrative remedies provided by the military service before seeking relief in civilian courts.'" Penagaricano v. Llenza, 747 F.2d 55,61 (1st Cir 1984).

(d) "In this case (Navas) there is no reason to make an exception to the general rule mandating exhaustion."

(2) Fourth Circuit : Williams v. Wilson, 762 F.2d 357, 358, 360 n.6 (4th Cir. 1985). The Court of Appeals "held that the Federal claim that the National Guard violated its own regulation when it empanelled an improper selective retention board was a nonjusticiable military

controversy where the member failed to exhaust his intraservice administrative remedies."

(a) "The proper action for the District Court would have been to dismiss Williams' claim without prejudice as premature." (n.6).

(b) n.6: "While the ABCMR lacks authority to order the West Virginia Army National Guard to reinstate Williams were it to find in his favor, it would have the power to correct Williams' federal records to show that his federal recognition has not been withdrawn, reinstate Williams in a comparable active federal reserve status, restore his pay and order compensatory back pay". Penagaricano v. Llenza, 747 F.2d. 55,57, (1st Cir 1984); Navas v. Vales, 752 F.2d 765,770 (1st Cir 1985).

(3) Fifth Circuit : Hodges v. Callaway, 499 F.2d 417,420 (5th Cir. 1974).

The Court of Appeals "held that serviceman who claimed that his discharge for convenience of the government was in fact designed as punishment and that the Army did not comply with established procedures was required to exhaust administrative remedies and failure to do so precluded district court from entering suit."

(a) Beginning with McCurdy v. Zuckert, 359 F.2d 491, (5th Cir 1966), "This Court has firmly adhered to the rule that a plaintiff challenging an administrative military discharge will find the doors of the federal courthouse closed pending exhaustion of available administrative remedies." Except that "only those remedies which provide a real opportunity for adequate relief need be exhausted."

c. Following is an example wherein the decision of the United States Court of Appeals for the Third Circuit in the present

case is in direct conflict with the current exhaustion policy within its own Third Circuit:

(1) Third Circuit : Jorden v. National Guard Bureau, 799 F.2d 99, 102 n.5. (3rd Cir. 1986). While the Court of Appeals decided this case on other issues, it also corrected the lower Court's erroneous conclusion, "that Jorden's failure to exhaust administrative remedies was an additional basis for dismissal," by defining the current exhaustion policy in the Third Circuit as follows, which is consistent and uniform with other Circuits as sampled above:

(a) " --this Court has not adopted a per se exhaustion requirement for military personnel. - - Rather, we said, exhaustion depends on the potential adequacy of that remedy in the particular case." Our approach "favors exhaustion but does not

require it where the administrative remedy would be inadequate."

(b) In Jorden, at 102n.5., the Court of Appeals went on to explain that the AFBCMR could not afford Jorden satisfactory relief because of the overriding characteristic of State control in that case, as had been respectfully pointed out to the Court of Appeals in contrast to the present case as reported above in "Statement of the Case," para.9. b.&c., which is consistent and uniform with the current Third Circuit exhaustion policy and those found in other Circuits but not followed in making the decision in the present case.

(c) Conversely, had Jorden not been employed by the State Guard in a full-time civilian technician position where continuation of that civilian employment is directly dependent on Jorden's continued military membership in the State Guard, thus

eliminating the "overriding characteristic of State control," satisfactory relief could have been afforded by the AFBCMR in that case and exhaustion would have then been required of Jorden by the current exhaustion policy of the Third Circuit just as it was in Navas and Williams, respectively, at para. 1.b.(1) and (2) above and as it should be in the present case as well all on a consistent and uniform basis.

(d) Following is an example wherein the decision of the United States Court of Appeals for the Third Circuit in the present case is in direct conflict with a recent exhaustion decision in a Third Circuit District court:

(1) Third Circuit, District Court for the District of Delaware : Karr v. Carper, United States District Court, District of Delaware, CA 88-466 MMS, Unreported Opinion (31 March 1993). While

the District Court decided this case on other issues, it first ruled on the matter of exhaustion where Defendants contended "that it is inappropriate for the Court to render an opinion on the merits of this case because Plaintiff has failed to exhaust his administrative remedies". Specifically, Defendants, represented by the Delaware Department of Justice (DOJ) as in the present case, "assert Plaintiff should have sought review of his separation from the Army Board for Correction of Military Records (ABCMR)."

[Note: Defendants' assertion above in Karr is a defense strategy directly opposite from that employed by the very same Delaware DOJ representing Defendants in the present case in which there is no "overriding characteristic of State control" which is directly opposite from the Karr case. The Defendants' assertion that exhaustion should

have been required of Karr was overruled and reversed by the District Court because of the "overriding characteristic of State Control" present in Karr; conversely, therefore, Defendants' opposite assertion in the present case, that exhaustion should not be required of Walsh, should also be overruled and reversed for the opposite reason, because there is no "overriding characteristic of State control present in Walsh.]

(a) The District Court ruled that "Karr's failure to exhaust his administrative remedies by petitioning the ABCMR does not impinge upon the Court's obligation to render a decision following a trial."

(b) The District Court cited Jorden v. National Guard Bureau, 799 F.2d 99, 102 n.5. (3rd Cir. 1986) and explained that the approach of the Third Circuit Court

of Appeals regarding exhaustion "focused on the adequacy of the remedy the administrative process could potentially supply" pointing out that, as in Jorden, the ABCMR could not provide an adequate remedy to Karr because of the overriding characteristic of State control in the Karr case.

(c) The District Court further explained that "the potential remedy here is an order directing Delaware State National Guard personnel to reevaluate Karr's separation" from his Army Guard/Reserve (AGR) tour (full-time active duty employment under state control) where "Karr in his role as AGR member was under State, not Federal control" and "the ABCMR, as a Federal board does not possess the power to issue such an order."

[Note: Conversely, the present case involves a part-time citizen soldier like

the vast majority of Guard members which does not carry with it the "overriding characteristic of State control" present in cases like Karr and Jorden, that precludes adequate A(F)BCMR remedies in those cases; therefore the ABCMR in the present case, as in Navas and Williams above at para. 1. b. (1) and (2), respectively, can provide the adequate remedies necessary under the generally consistent and uniform exhaustion policies that currently exist within the various Circuits, including the Third Circuit, in order to require exhaustion.]

e. Following is an example wherein the United States Court of Appeals for the Third Circuit in the present case has decided a Federal question in a way that conflicts with an applicable decision of this Court:

(1) "In Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51, 58 S. Ct. 459, 463, 82 L. Ed. 638 (1938), the

Supreme Court stated that it is a 'long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.'" First Jersey Securities, Inc. v. Bergen, 605 F. 2d 690, 695 (3rd Cir. 1979).

2. The present case also presents an opportunity for this Court to correct a serious error of law arising when 29 U.S.C. 626 (e) prior to its 21 Nov 91 amendment was found to time bar a willful age discrimination cause of action even though the undisputed facts and arithmetic clearly show that the Complaint was timely filed within the appropriate three year statute of limitations used in the District Court's own calculations of the time period between the date of filing and the date the cause of action accrued, neither of which was in

dispute by any party. Review and resolution of this problem by this Court is of general importance to all who rely on the fairness and integrity of our justice system which carries its importance well beyond just the parties immediately involved in the present case and therefore underscores the need for resolution in order to warrant and maintain the public trust.

a. The District Court's 5 May 93 Opinion affirmed by the United States Court of Appeals for the Third Circuit without opinion and reproduced as Appendix B cites as its first "fact" that Walsh filed the Complaint on 22 May 1992 and confirmed in its next to last "Discussion" paragraph that Walsh's willful age discrimination cause of action accrued on 23 May 1989. The District Court also stated that the Court Committed an error of law by previously imposing a 90 day statute of limitations and agreed that

the applicable statute of limitations was two years after the cause of action accrues, or three years if the violation was willful. The Court then Applied the three year statute of limitations for Walsh's willful age discrimination cause of action to the period between 23 May 89 and 22 May 92 and somehow concluded that Walsh's willful age discrimination cause of action "would still be time barred." (App. B-2, 9).

(1) Walsh identified the details of the above suggested error, which if corrected would cause the Courts to reach a different result, to the Court of Appeals both in his initial "Informal Brief", as reported above in "Statement of the Case" para. 7. a.(2), and also in his Motion for Rehearing, reproduced as Appendix E, at page E-15, para. 3.

CONCLUSION

For the foreg ing reasons, Petitioner

respectfully requests that this Court grant the petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

Richard M. Walsh

RICHARD M. WALSH, PRO SE
2209 Pennington Drive
Wilmington, DE 19810
(302) 475-3697

Dated: 9 March 1994

APPENDIX

APPENDIX A-1

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 93-7421

RICHARD M. WALSH,
Appellant

v.

STATE OF DELAWARE; MICHAEL N. CASTLE, Governor of the State of Delaware, ex officio and in personam his successors and assigns;
THE DEPARTMENT OF MILITARY AFFAIRS

On Appeal from the United States District Court
for the District of Delaware
(D.C. Civil No. 92-00298)
District Judge: Hon. Joseph J. Farnan

Submitted Pursuant to Third Circuit LAR 34.1(a)
November 12, 1993

Before: SLOVITER, Chief Judge
COWEN and LEWIS, Circuit Judges

JUDGMENT ORDER

After consideration of all

contentions raised by appellant, it is

ADJUDGED and ORDERED that the judgment of the district court entered May 6, 1993 be and is hereby affirmed. Costs taxed against appellant.

By the Court,

Attest:

(s) P. DOUGLAS SISK
P. Douglas Sisk, Clerk

(s)D.K. SLOVITER
Chief Judge

Dated: November 19 1993

APPENDIX B-1

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

RICHARD M. WALSH,	:	
	:	
Plaintiff,	:	
	:	CIVIL ACTION NO:
v.	:	92-298-JJF
	:	
STATE OF DELAWARE,	:	
MICHAEL N. CASTLE, and	:	
THE DEPARTMENT OF MILITARY	:	
AFFAIRS,	:	
	:	
Defendants.	:	

Richard M. Walsh. Pro se Plaintiff.

John J. Polk, Deputy Attorney General, Department of Justice, Wilmington, Delaware. Attorney for Defendants.

MEMORANDUM OPINION

May 5, 1993

Wilmington, Delaware

(s) JOSEPH J. FARNAN,Jr.
FARNAN, District Judge.

I. INTRODUCTION

The Plaintiff, Richard M. Walsh, has moved the Court pursuant to Local Rule 7.1.4 to reconsider the Court's Order granting Defendant's Motion to Dismiss. (D.I. 19). The Court will deny Plaintiff's Motion for Reconsideration because the Plaintiff has failed to demonstrate that the Court would have reached a different result had it been aware of the alleged errors.

II. FACTS

On May 22, 1992, Plaintiff Walsh filed a civil rights complaint against the State of Delaware, Michael N. Castle, and Delaware's Department of Military Affairs seeking damages and injunctive relief pursuant to 29 U.S.C. 621 et seq., 42 U.S.C. section 1983, 42 U.S.C. sections 1985 (1), (2), (3), and 42 U.S.C. section 1986. (Complaint, at section II). The Complaint alleged six causes of action. Counts One

and Two alleged that Plaintiff's employment in the Delaware National Guard was unlawfully terminated prematurely in violation of statute and public policy. Count Three alleged that Plaintiff's termination was in willful violation of Plaintiff's right to substantive and procedural due process. Counts Four and Five alleged that Plaintiff's reinstatement was unlawfully denied in willful violation of statutes, public policy, and substantive and procedural due process. Finally, Count Six alleged that Plaintiff's reinstatement was denied in willful violation of his right not be discriminated against on the basis of age as provided in 29 U.S.C. Section 621 et seq.

Defendants moved the Court to dismiss the Complaint contending that each of the claims was barred by the applicable statute of limitations. The Court granted Defendants' Motion to Dismiss holding that

all of Plaintiff's claims were time-barred. First, the Court found that Plaintiff's first three causes of action, grounded in the alleged unlawful and premature termination of Plaintiff's employment with the National Guard, accrued on August 21, 1982. Therefore, applying a two-year statute of limitations, the Court concluded that causes of action one, two, and three were time barred.

Furthermore, the Court found that Plaintiff's fourth and fifth causes of action, which were grounded in the National Guard's refusal to reinstate Plaintiff, accrued on May 23, 1989, the date on which Adjutant General Episcopo informed Plaintiff that the Delaware Army National Guard would not take further action on his request for reinstatement. Therefore, the Court concluded that these causes of action were likewise barred by the applicable two-year statute of limitations.

Finally, the Court concluded that Plaintiff's allegation that the Delaware Army National Guard discriminated against him on the basis of age in denying his request for reinstatement was barred by the statute of limitations found in 29 U.S.C. 626(e), which is 90 days from receipt of notice that EEOC proceedings are terminated. The EEOC mailed such notice to Plaintiff on January 31, 1990.

On January 11, 1993, Plaintiff filed the Motion for Reargument presently before the Court.

III. DISCUSSION

Although Local Rule 7.1.4 permits a party to file a motion for reargument, the courts in the District of Delaware have consistently held that motions for reargument ought to be granted sparingly. "It should be granted in circumstances where the Court has patently misunderstood a party or made an error not of reasoning but of

apprehension." Karr v. Castle, 768 F. Supp. 1087, 1090 (D. Del. 1991). Thus, the Court will grant Plaintiff's motion only if the Court is convinced that (1) the Court made an error of law or mistake of fact, and (2) if aware of the error or mistake, the Court would have reached a different result.

Plaintiff contends that the Court erred in three respects. First, Plaintiff disputes the Court's finding that Plaintiff's first five causes of action accrued on or before May 23, 1989. Plaintiff contends that the first five causes of action accrued on December 3, 1990, at which time "Federal officials designated by the Delaware Department of Justice to provide a 'proper' hearing and due process, informed Plaintiff, thru [sic] Senator Biden, that: (1) 'He has exhausted his opportunity for relief within the Army's administrative appeals system," and (2) "His only recourse now is in a Federal Court of

competent jurisdiction." (D.I. 19, Paragraph 1).

The Plaintiff has not persuaded the Court that the Court erred as a matter of law in finding that Plaintiff's causes of action accrued on or before May 23, 1989 as opposed to December 3, 1990. Plaintiff has pointed to no "error of apprehension," to warrant reconsideration of the Court's conclusion. By highlighting the December 3, 1990 letter, Plaintiff attempts to communicate to the Court that the statute of limitations on his civil rights causes of action was tolled until he exhausted his administrative appeals. But, generally a plaintiff is not required to exhaust state administrative remedies prior to initiating a civil rights suit in federal court. Patsy v. Board of Regents, 457 U.S. 496 (1982). Plaintiff has cited no authority to persuade the Court that the National Guard's appeals system impacted in any way Plaintiff's time

for filing his civil rights complaint in federal court. Absent a showing that the Court committed an error of law, or a mistake of fact, reconsideration of the Court's order dismissing Plaintiff's first five causes of action as barred by the statute of limitations is not warranted.

Plaintiff next alleges that the Court erred in holding that his sixth cause of action was barred by the relevant statute of limitations. As the Plaintiff notes, the Court applied the statute of limitations found in 29 U.S.C. Section 626(e) as amended on November 15, 1991. Plaintiff argues that the applicable statute of limitations would be that statute of limitations in effect prior the 1991 amendments. According to the Plaintiff, the statute of limitations for age discrimination claims brought pursuant to 29 U.S.C. Section 621 et seq. prior to November 15, 1991, was two years after the cause of action accrues, or three years if

the violation was willful.

The Court agrees that the applicable statute of limitations is that found in 29 U.S.C. 626(e) prior to the 1991 amendments, i.e. two years after the cause of action accrues, or three years if the violation was willful. Although the Plaintiff has demonstrated that the Court committed an error of law in applying the statute of limitations in effect after November 15, 1991, the Plaintiff has not demonstrated that the Court would have reached a different result had the Court used the two or three year statute of limitations. As noted above, the Court found that Plaintiff's causes of action based on the National Guard's failure to reinstate him at the latest accrued on May 23, 1989. Thus, even if the Court applied the three year statute of limitations, as 29 U.S.C. 626(e) provided for prior to November 15, 1991, the cause of action would still be

time barred. Because Plaintiff is unable to show that the Court would have reached a different result, reconsideration of the Court's order dismissing Plaintiff's age discrimination cause of action must be denied.

Lastly, Plaintiff alleges that the Court erred in concluding that Plaintiff was required to show some racial animus to establish a claim under 42 U.S.C. Section 1985. Plaintiff cites the case of U.S. ex rel. Karr v. Castle, 746 F.Supp 1231 (D. Del. 1990) to support his contention that his civil rights claims are

> **based on alleged specific constitutional deprivations,** e.g. involving property and liberty interests affected by the false reason given for Plaintiff's termination, denial of a pretermination hearing, and deliberate and arbitrary abuse of government power tainted by improper motive, **which are themselves sufficient without any racial animus to establish Plaintiff's claim under 42 U.S.C. sec. 1985.**

(D.I. 19, at Paragraph 3). The Court finds

it unnecessary to discuss this assignment of error because, as the Court has determined previously and reiterated above, Plaintiff's claims under 42 U.S.C. Section 1985 are barred by the statute of limitations. Even if the Court erred in holding that Plaintiff was required to show racial animus, such an error did not impact the Court's decision to dismiss the Complaint. Since the Plaintiff has not shown that the Court would have reached a different result had it been aware of the alleged error, reconsideration of the Court's decision to dismiss Plaintiff's Section 1985 claim is not warranted.

IV. CONCLUSION

Plaintiff has failed to convince the Court that the Court committed an error of law or mistake of fact that, if corrected, would have caused the Court to reach a different result. Accordingly, the Court will deny Plaintiff's Motion for Reargument. An appropriate Order will be entered.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

RICHARD M. WALSH,	:	
	:	
Plaintiff,	:	
	:	Civil Action
	:	No. 92-298-JJF
v.	:	
	:	
STATE OF DELAWARE,	:	
MICHAEL N CASTLE, and	:	
THE DEPARTMENT OF MILITARY	:	
AFFAIRS,	:	
	:	
Defendants.	:	

O R D E R

At Wilmington this 5 day of May, 1993, for the reasons set forth in the Memorandum Opinion issued this date,

IT IS HEREBY ORDERED that Plaintiff's Motion for Reargument is DENIED.

(s) Joseph J. Farnan, Jr.

UNITED STATES DISTRICT JUDGE

APPENDIX C-1

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

RICHARD M. WALSH,	:	
	:	
Plaintiff,	:	
	:	Civil Action No.
	:	92-298-JJF
v.	:	
	:	
STATE OF DELAWARE,	:	
MICHAEL N CASTLE, and	:	
THE DEPARTMENT OF MILITARY	:	
AFFAIRS,	:	
	:	
Defendants.	:	

Richard M. Walsh. Pro Se Plaintiff.

John J. Polk, Deputy Attorney General, Department of Justice, Wilmington, Delaware. Attorneys for Defendant.

MEMORANDUM OPINION

December 30, 1992

Wilmington, Delaware

(s) Joseph J. Farnan, Jr.
FARNAN, District Judge.

The Court has before it Defendants' Motion to Dismiss filed pursuant to Fed. R. Civ. P. 12(b)(6). (D.I. 6). On May 22, 1992, Plaintiff Walsh filed a civil rights complaint seeking damages and injunctive relief pursuant to 29 U.S.C. Section 621, 42 U.S.C. Section 1983, 42 U.S.C. Section 1985 (1), (2), (3), and 42 U.S.C. Section 1986. (Complaint, Section II). Plaintiff Walsh alleges that "his employment in the Delaware National Guard was unlawfully prematurely terminated" by Defendants' failure to promote him to a general officer position. (Complaint, Section IV, at Paragraphs 1-3). He alleges that he was not promoted to Deputy Commander because of his "lawful and conscientious execution of his duties in the service of the Delaware Army National Guard." (Complaint, Section IV, at paragraph 2). He further alleges that the decision not to

promote him, and the denial of his request for reinstatement, violated his constitutional right to procedural and substantive due process, as guaranteed by the Fifth and Fourteenth Amendments. (Complaint, Section IV, at paragraphs 3, 5). Finally, Plaintiff Walsh alleges that the Delaware National Guard's denial of his request for reinstatement violated his right not to be discriminated against on the basis of age. (Complaint, Section IV, at 6).

Defendants' allege that Plaintiff's Civil rights claims filed pursuant to Sections 1983, 1985, 1986 are untimely. Although there is no federal statute of limitations for causes of action brought pursuant to Sections 1983, 1985, and 1986, the Supreme Court has held that the applicable limitations period is the statute of limitations which governs the most analogous cause of action under state law. Wilson v. Garcia, 471 U.S. 261, 276 (1985);

see also Henig v. Odorioso, 385 F.2d 491 (3rd Cir.), cert. denied, 390 U.S. 1016, reh'g denied, 391 U.S. 929 (1969). In Wilson, the Supreme Court held that Section 1983 actions are to be characterized as personal injury actions for statute of limitations purposes. Id. The Court extended Wilson in Owens v. Okure, 109 S.Ct. 573, 574 (1989), where it held that if a state has more than one personal injury statute of limitations, "the residual or general personal injury statute of limitations" should be applied. See Christmas v. Marson, No. 89-5498, slip. op. (3d Cir. January 3, 1990) (applying New Jersey's two-year general personal injury statute of limitations in an employment discrimination suit filed pursuant to Section 1983); accord Black Whale, Inc. v. Borough of Beach Haven, 1990 U.S. Dist. LEXIS 2504, at *5-6 (D.N.J. February 9, 1990).

In accordance with the Supreme Court and Third Circuit decisions, the Court concludes that the most analogous Delaware statute is Delaware's general limitations statute, Del. Code Ann., tit. 10, Section 8119, which provides a two year statute of limitations for personal injury actions. Therefore, the Court must determine whether Plaintiff's complaint sets forth any cause of action which accrued within the limitations period -- on or after May 22, 1990.

Plaintiff's first three causes of action allege injury from Defendants' unlawful and premature termination of his employment in the Delaware Army National Guard. On August 21, 1982, Plaintiff was mandatorily released from the Delaware Army National Guard. Plaintiff alleges he was forced to retire because the National Guard wrongfully denied him a promotion to a Deputy Commander. It is clear from these

facts that Plaintiff's injury, if any, accrued on August 21, 1982, the day upon which he was forced to retire. Therefore, to the extent that Plaintiff alleges claims under Sections 1983, 1985, 1986, these claims are time barred. Accordingly, each must be dismissed.

Plaintiff's third and fourth causes of action allege statutory and constitutional violations arising out of the National Guard's denial of his request for reinstatement. In an attempt to avoid the statute of limitations problem, Plaintiff characterizes these causes of action as "continuing violations" of his rights. The Court does not agree. On May 23, 1989, Adjutant General Episcopo informed Plaintiff that the Delaware Army National Guard would take no further action on his request for reinstatement. Thus, the Court finds that Plaintiff's third and fourth causes of action, challenging the denial of his

reinstatement, accrued on May 23, 1989, well outside the allowable limitations period. Therefore, to the extent that Plaintiff's causes of action state claims under Sections 1983, 1985, 1986, they are also time barred. Accordingly, Plaintiff's fourth and fifth causes of action must be dismissed.

Plaintiff's last cause of action alleges that the Delaware Army National Guard discriminated against him on the basis of age, in denying his request for reinstatement. As discussed above, any cause of action premised on the facts alleged accrued on May 23, 1989, at which time the Delaware Army National Guard informed Plaintiff that its denial was final and would not be reconsidered.

The applicable statute of limitations under 29 U.S.C. 621 et al. is 90 days from receipt of notice that EEOC proceedings are terminated. The EEOC mailed such a notice to Plaintiff on January 31,

1990. (Plaintiff's Response in Opposition to Defendants' Motion to Dismiss, Ex. K). Plaintiff has not alleged that he did not receive this notice in due course. Thus, the Court must conclude that more than 90 days passed since Plaintiff's receipt of the notice. As with Plaintiff's other claims, the cause of action pursuant to Section 621 is time barred. Accordingly, it must also be dismissed.

Moreover, Plaintiff's claim under 42 U.S.C. Section 1985 is likewise without merit. "The United States Supreme Court has interpreted the language of Section 1985--permitting a cause of action for the deprivation of equal protection, privileges or immunities--to mean that 'there must be some racial or perhaps otherwise class-based invidiously discriminatory animus behind the conspirators' action.'" Pagano v. Hadley, 553 F. Supp. 171, 173 (D. Del. 1982) (quoting Griffin v. Breckenridge, 403 U.S.

88, 102 (1971)). Plaintiff has not alleged that defendants' actions were motivated by some class-based discrimination. The facts that Plaintiff alleges directly contradict a conclusion of such class-based discrimination. Plaintiff alleges facts to lead to a conclusion that he was not promoted, and thus forced to retire, because he attempted to right wrongs that he observed. Accordingly, Plaintiff's claim under Section 1985 must also be dismissed.

An appropriate Order will be entered.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

RICHARD M. WALSH,	:	
	:	
Plaintiff,	:	
	:	Civil Action
	:	No. 92-298-JJF
v.	:	
	:	
STATE OF DELAWARE,	:	
MICHAEL N CASTLE, and	:	
THE DEPARTMENT OF MILITARY	:	
AFFAIRS,	:	
	:	
Defendants.	:	

ORDER

At Wilmington this 30 day of December, 1992, for the reasons set forth in the Memorandum Opinion issued this date,

IT IS HEREBY ORDERED that Defendants' Motion to Dismiss is GRANTED.

(s) Joseph J. Farnan, Jr.

UNITED STATES DISTRICT JUDGE

APPENDIX D-1

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-7421

RICHARD M. WALSH

V.

STATE OF DELAWARE;MICHAEL N. CASTLE,
ex officio and in personam his successors
and assigns;
THE DEPARTMENT OF MILITARY AFFAIRS

SUR PETITION FOR REHEARING

Present: SLOVITER, Chief Judge, BECKER,
STAPLETON, MANSMANN, GREENBERG,
HUTCHINSON, SCIRICA, COWEN,
NYGAARD, ALITO, ROTH and LEWIS,
Circuit Judges

The petition for rehearing filed by Appellant Richard M. Walsh in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for

rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

(s)Dolores K. Sloviter
Chief Judge

Dated: Dec 16 1993

APPENDIX E-1

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RICHARD M. WALSH,

Appellant,

v.

STATE OF DELAWARE, ET AL,

Appellees.

Appellant's Motion for Rehearing
Richard M. Walsh

No. 93-7421

Appeal From A Final Judgment
Of The United States District Court
For The District Of Delaware
C.A. No. 92-298

RICHARD M. WALSH
2209 Pennington Drive
Wilmington, DE 19810
(302) 475-3697

PRO SE

I. MOTION FOR REHEARING

Appellant respectfully moves for a rehearing in the sincere belief that, in affirming the judgment of the District Court filed on May 5, 1993, the Court, in its Judgment-Order entered in this Case No. 93-7421 on November 19, 1993, has overlooked and/or misapprehended one or more of the specific points of law and fact as discussed below; consequently, failing to maintain uniformity of decisions in this Court. A rehearing in banc is therefore suggested. Appellant further requests the Court's permission to amend this Brief if any clarification of the basis for the Judgment-Order would become available.

II. DISCUSSION

1. In the absence of a Memorandum Opinion or any other clarification as to the basis for the Court's November 19, 1993 Judgment-Order, it is assumed for the purpose of this

Brief that the Court's affirmation of the District Court's May 5, 1993 Judgment relies on its companion Memorandum Opinion issued by the District Court on that same date which will be used to guide Appellant's discussion below.

A. EXHAUSTION

2. The District Court, in its Memorandum Opinion issued May 5, 1993, stated on pages 3 & 4 that: (a) "Plaintiff (Appellant) disputes the Court's finding that Plaintiff's first five causes of action accrued on or before May 23, 1989. Plaintiff contends that the first five causes of action accrued on December 3, 1990 --"; (b) "Plaintiff has pointed to no 'error of apprehension,' to warrant reconsideration of the Court's conclusion"; and (c) "Plaintiff has cited no authority to persuade the Court that the National Guard's appeal system impacted in any way Plaintiff's time for filing his civil rights

complaint in federal court." Regarding the above:

a. Appellant (Plaintiff) erred in his initial wording and, in fact, does agree with the District Court's finding that the Appellant's first five causes of action actually did accrue on or before May 23, 1989; but contends, this time in the proper language of the Court, that the statute of limitations on Appellant's first five causes of action was tolled until he exhausted his Federal - -not State - - administrative appeals on December 3, 1990.

b. Appellant respectfully points to the following errors of apprehension and of law which, if corrected, would cause the Court to reach a different result: The District Court's Opinion states that "Plaintiff attempts to communicate to the Court that the statute of limitations on his civil rights causes of action was tolled until he exhausted his administrative

appeals. But generally a plaintiff is not required to exhaust state administrative remedies prior to initiating a civil rights suit in federal court." Thus, referring to the "administrative appeals" incorrectly as "state administrative remedies" which is clearly an error of apprehension on the part of the Court for the following reasons: Appellant has consistently stated that the Delaware Department of Justice had deferred to and directed Appellant to Federal officials in the Army's Federal administrative appeals system, namely, the Army Board for Correction of Military Records (ABCMR). The Del. DOJ's letter to Appellant further explained that "The charges concerning promotion and premature termination are not properly before this (State) Office because these matters are examined and approved by federal officials." Therefore, citing Patsy v. Board of Regents, which has no relevance to the present case,

is obviously an error of law based on the above error of apprehension since Patsy deals solely with State administrative remedies, not Federal.

(1) It is a very common misapprehension to think of the "National Guard" as being strictly a State organization, when in fact it has an "unusual 'hybrid' status as an agency with both federal and state characteristics." Johnson v. Orr, 780 F. 2nd 386, 388 (3rd Cir. 1986).

(2) "The National Guard is a component of the Militia of the various states. Members of such state systems may (with Federal Recognition) also become members of the Army or Air National Guard of the United States ['ARNGUS' or 'ANGUS']. A federal board for the correction of military records has the authority to correct federal aspects of a Guard member's military records." Karr v. Carper, No. 93-7410,

March 31, 1993 Opinion, C.A. 88-466 MMS, page 3 n. 2.

c. Appellant again respectfully points to an error of apprehension which, if corrected, would cause the Court to reach a different result: In the context of the District Court's May 5, 1993 Opinion in the present case, its reference to the "National Guard's Appeals system" equates it incorrectly to a State appeals system. As discussed above at 2.b., the Del. DOJ ruled that there was no State appeals system available in Appellant's case, only Federal, because it concerns promotion and premature termination. Therefore, The Third Circuit Court of Appeals is the authority to persuade the District Court that the Army's Federal administrative appeals system did in fact impact Plaintiff's time for filing his civil rights complaint in Federal Court by tolling the statute of limitations until Appellant had exhausted his Federal

administrative appeals on December 3, 1990.

(1) While The Third Circuit Court of Appeals has not adopted a per se exhaustion requirement for military personnel seeking redress in Federal Court, it did say that "exhaustion depends on the potential adequacy of that remedy in the particular case," and that the Court's approach "favors exhaustion but does not require it where the administrative remedy would be inadequate." Jorden v. National Guard Bureau, 799 F.2d 99, 102 n. 5 (3rd Cir. 1986).

(2) Because Appellant was a member in good standing of the Army National Guard of the United States (ARNGUS) with full Federal Recognition, the Army's Federal administrative appeals system (ABCMR) had the potential, regarding the matter involved in the present case, to supply a fully adequate administrative remedy consisting of either:

(a) Correction of Appellant's federal records, to show that his federal recognition has not been withdrawn and that he remains a member in good standing of the (ARNGUS), and reinstatement to State status with restoration of pay and compensatory back pay if recommended by the ABCMR to, and then ordered by the State: or

(b) Correction of Appellant's federal records, as above, and reinstatement in a comparable active federal reserve status with restoration of pay and compensatory back pay ordered directly by the ABCMR. Penagaricano v. Llenza, 747 F.2d. 55, 57 (1st Cir. 1984) and Williams v. Wilson, 762 F.2d. 357, 360 n. 6 (4th Cir. 1985).

(3) Therefore, Appellant's contention that his exhaustion of the Army's administrative appeals system (ABCMR), in the role assigned to that Federal agency by

the Congress, was required prior to filing a complaint in Federal Court is consistent with the position of The Third Circuit Court of Appeals as stated above at para. c.(1).

(4) It is important to understand that the Federal administrative remedies above at para. c.(2) were available to Appellant only because he held a dual military membership in the Army National Guard of the United States (ARNGUS) with full Federal Recognition; and were fully adequate only because Appellant was a military (part-time citizen soldier) only and did not also hold a full-time civilian technician job, or other State controlled position, in the State Guard, the latter being contingent upon the individual being retained as a military member of the State Guard.

(a) Thus, the critical difference between the present case and the Jorden case cited above at para. c.(1): In

addition to being a military member of the State Guard, Jorden was also employed as a full-time civilian technician. When Jorden was dismissed from his military position in the Pennsylvania Air National Guard, his civilian technician employment was automatically terminated because only military members of the State Guard are eligible for civilian technician employment.

(b) Therefore, since the AFBCMR, a Federal board, could not order Jorden's reinstatement in the State Guard, nor could it reinstate Jorden to his civilian technician position in any event, The Third Circuit Court of Appeals did not require exhaustion because, consistent with its position as stated above at para. c.(1), "the administrative remedy would be inadequate." Exactly opposite the circumstances in the present case, wherein the potential for administrative remedy was and continues to be fully adequate and,

therefore, exhaustion was required in the present case in accordance with the Court's clearly stated position at c. (1) above and to maintain uniformity of the Court's decisions. Jorden v. National Guard Bureau, 799 F.2d. 99, 102 (3rd Cir. 1986).

(5) Appellees are well aware of the position taken by The Third Circuit Court of Appeals and the criteria for the bases of the Court's decision regarding exhaustion. They are also very familiar with the details discussed above in Jorden.

(a) Del. DOJ Counsel for Appellees in the present case is also Counsel for the DEARNG in Karr v. Carper, No. 93-7410. In that case, where Plaintiff correctly filed his Complaint in Federal District Court without first appealing to the ABCMR for administrative remedy, Defendants took an approach exactly opposite that taken in the present case by contending incorrectly that it was inappropriate for

the District Court to render an opinion on the merits of the Karr case because Plaintiff had failed to exhaust his administrative remedies. Specifically asserting, again incorrectly, that Plaintiff should have sought review of his separation from the ABCMR. Karr v. Carper, No. 93-7410, March 31, 1993 Opinion, C.A. 88-466MMS, page 2.

(b) The District Court, in its March 31, 1993 Opinion, page 2, clearly explained The Third Circuit Court of Appeal's position on exhaustion, as discussed above at para. c. (1), and its near identical application in Karr as previously in Jorden. The Court's Opinion explained that, similar to Jorden losing his civilian technician job which was under State control, Karr was separated from an AGR tour of duty that was also under State, not Federal control; and because the ABCMR could not order the State to reinstate Karr

in the AGR program anymore than it could order the State to reinstate Jorden as a civilian technician, the potential for administrative remedy was found inadequate and, therefore, exhaustion was correctly not required in either Jorden or Karr and for identical reasons: because the overriding characteristic of the State control existed in each of those cases which is directly contrary to the present case.

(c) Conversely, therefore, if the circumstances and characteristics of the present case, above at para. c.(4), existed in Jorden and Karr, the result would have been the opposite; exhaustion would have been required, as it is in the present case, because, without the "State Control" characteristic involved, the potential would have existed in Jorden and Karr for a fully adequate Federal administrative remedy. In light of the Court decisions and writings discussed above, if Third Circuit law

regarding exhaustion is applied to the present case in a manner consistent with its application in Jorden and Karr, the Court's decision could only be that exhaustion was required in the present case. To decide otherwise would constitute an error of law totally inconsistent with the Court's established rationale on the subject and would therefore violate the uniformity of the Court's past decisions regarding exhaustion.

B. AGE DISCRIMINATION

3. The District Court, in its Memorandum Opinion issued May 5, 1993, stated on page 5 that: (a) Plaintiff has demonstrated that the Court initially committed an error of law in applying a 90 day statute of limitations; (b) Court agreed that the applicable statute of limitations should be two years after the cause of the action accrues, or three years if the violation was

willful; (c) Plaintiff has not demonstrated that the Court would have reached a different result had the Court used the two or three year statute of limitations; (d) The Court found that Plaintiff's age discrimination cause of action at the latest accrued on May 23, 1989; (e) Thus, even if the Court applied the three year statute of limitations, the cause of action would still be time barred.

(a) Appellant (Plaintiff) respectfully points to the Court's conclusions at 3. (c) and (e) above as errors of fact and apprehension which if corrected would cause the Court to not dismiss Appellant's age discrimination cause of action but rather, to hear and judge the claim on its merits.

(1) The Court has apparently overlooked the first "FACT" stated in the District Court's May 5, 1993 Memorandum Opinion at page 1 and also "CONCLUSION" C.(2) found in Appellant's Informal Brief at

page 6, and para. 5.B. at page 10.

(a) The apparently overlooked fact is that Plaintiff filed his Complaint on May 22, 1992 which, when coupled with the Court's finding at 3.(d) above, that Plaintiff's age discrimination cause of action accrued on May 23, 1989, proves that the filing was within the applicable three year statute of limitations for willful age discrimination and that the Court's conclusions at 3.(c) and (e) above are, therefore, errors of fact and apprehension.

4. In case it might have also been overlooked, "substantial evidence" that Appellees knew or suspected that their actions might violate the ADEA was provided initially in Appellant's Complaint, page 45, para. 92-94, and in his Reply Brief, pages 14, 15, para. 2.a., 2.b., 3.a., 3.b.,) which, clearly exceeds the threshold for such "substantial evidence" as established

in Olsen v. Southern Pacific and Coleman v. Jiffy June Farms as referenced in Reply Brief on pages 13 & 14, para. 1.a., b. and c.

III. CONCLUSION

FOR THESE REASONS, Richard M. Walsh asks that the decision of the Delaware District Court be reversed and that both parties be directed to confer immediately on a possible settlement at no cost to Appellees, as explained in Appellant's Informal Brief, pages 11-13, para. 7.; and, in the event the settlement effort would fail, to direct Appellee's to answer Appellant's Complaint so that the issues and facts may be properly heard and judged by the Court on their merits.

Respectfully Submitted by:

Dated: 12/2/93 (s) Richard M. Walsh

RICHARD M. WALSH, PRO SE
2209 Pennington Drive
Wilmington, DE 19810
(302) 475-3697

Supreme Court, U.S.
FILED
JUL 8 1994
OFFICE OF THE CLERK

No. 93-1441

In The

Supreme Court of the United States

October Term, 1994

RICHARD M. WALSH,

Petitioner,

v.

STATE OF DELAWARE, MICHAEL N. CASTLE, and THE DEPARTMENT OF MILITARY AFFAIRS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

CHARLES M. OBERLY, III
Attorney General of the
State of Delaware

GARY A. MYERS
Deputy Attorney General
Counsel of Record

Delaware Department of Justice
114 E. Market Street
Georgetown, DE 19947
(302) 856-5353

July 8, 1994

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTION PRESENTED

Is a retired state National Guard officer entitled to have access to a federal district court in order to overturn a decision denying him promotion made ten years earlier?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

COUNTER-STATEMENT OF THE CASE 1

REASON FOR DENYING THE WRIT 7

Because It Is Not Clear That Petitioner Would Benefit From the Rule He Seeks, There Is No Reason To Grant Review 7

1. *The Civil Rights Claims* 7

2. *The ADEA Claim* 12

CONCLUSION 13

APPENDIX

Walsh v. Castle, et al., C.A. 92-298 (D. Del.), Plaintiff's Response in Opp. to Defendant's Motion to Dismiss, Exh. J. (Oct. 15, 1992) F-1

TABLE OF AUTHORITIES

Page

CASES

Board of Regents v. Tomanio, 446 U.S. 478 (1980) 8

Chappell v. Wallace, 462 U.S. 296 (1983) 10

Chardon v. Fernandez, 454 U.S. 6 (1981) 7

Frey v. State of California, 982 F.2d 399 (9th Cir. 1991) 13

Helm v. State of California, 722 F.2d 507 (9th Cir. 1983) 13

Hurick v. Lehman, 782 F.2d 984 (Fed. Cir. 1986) 8

Jorden v. National Guard Bureau, 799 F.2d 99 (3d Cir. 1986) 8

Kawitt v. United States, 842 F.2d 951 (7th Cir. 1988) 13

Knutson v. Wisconsin Air National Guard, 995 F.2d 765 (7th Cir. 1993) 10

Marker v. Talley, 502 A.2d 972 (Del. Super. 1985) 8

McLaughlin v. Richmond Shoe Co., 486 U.S. 128 (1988) 13

Navas v. Gonzalez Vales, 752 F.2d 765 (1st Cir. 1985) 9

Penagaricano v. Llenza, 747 F.2d 55 (1st Cir. 1984) 9

Perpich v. Department of Defense, 496 U.S. 334 (1990) 2

Sanders v. McCrady, 537 F.2d 1199 (4th Cir. 1976) 9

Watson v. Arkansas National Guard, 886 F.2d 1004 (8th Cir. 1989) 10

Williams v. Wilson, 762 F.2d 357 (4th Cir. 1985) 9

TABLE OF AUTHORITIES – Continued

Page

Wright v. Park, 5 F.3d 586 (1st Cir. 1993) 9

Wright v. United States, 19 Ct. Cl. 779 (1990) 8

STATUTES AND REGULATIONS

Age Discrimination Employment Act, 29 U.S.C. §§ 621-34 (1988) 4

10 U.S.C. § 1552(a) (1988) 3

10 U.S.C. § 3364(e) (1988) 4

10 U.S.C. § 3843(b) (1988) 4

10 U.S.C. § 3851(a) (1988) 2

29 U.S.C. § 255(a) (1988) 6, 12

29 U.S.C. § 626(e) (Supp. IV 1992) 6

29 U.S.C. § 626(e)(1) (1988) 6, 12

42 U.S.C. § 1983 5

42 U.S.C. § 1985 5

42 U.S.C. § 1986 5

Del. C. Ann. tit. 10, § 8119 (1975) 7

32 C.F.R. § 581.3(c) (1993) 3, 11

No. 93-1441

In The

Supreme Court of the United States

October Term, 1994

RICHARD M. WALSH,

Petitioner,

v.

STATE OF DELAWARE, MICHAEL N. CASTLE, and THE DEPARTMENT OF MILITARY AFFAIRS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully ask this Court to deny this petition for certiorari seeking review of an unreported judgment order of the United States Court of Appeals for the Third Circuit dated November 19, 1993.

COUNTER-STATEMENT OF THE CASE

1. From 1948 until 1982, Richard Walsh served as a citizen-soldier in the Delaware National Guard. Compl. ¶ 2. During most of his tenure, he wore the "two" hats

typical of a state guardsman: a member of the state militia as well as a "federally recognized" member of the reserve component of the United States Armed Forces, the National Guard of the United States. *See generally Perpich v. Department of Defense*, 496 U.S. 334, 345-49 (1990).[1]

2. The year 1982 was a watershed year for Walsh's military career; by then, he had served for more than 20 years and had held the rank of Colonel for almost a half-decade. But that year, he had to be promoted to Brigadier General. If he did not move up, then, under one of the myriad of statutes that Congress has enacted to prevent the armed forces from becoming top heavy with entrenched officers, he would face mandatory assignment to the federal "retired reserve." *See* 10 U.S.C. § 3851(a) (1988). That change would have ended his dual national guard service. At the time, a Brigadier General slot was open in the Delaware guard: that of Deputy Commanding General of the 261st Signal Command. Although Walsh was considered for the command by the convened promotion selection board, the Adjutant General of Delaware eventually decided to select another person for the "federally recognized" Deputy Commander position. Compl. ¶¶ 12-14, 33. On April 29, 1982, Walsh had been informed that he was no longer in the running for the position. Compl. ¶ 26.

3. Walsh saw the selection of the other person – later determined to be medically unsuited – as an act of

---

[1] For his three decades of valued service, petitioner deserves, and has, his State's gratitude and respect.

political cronyism, achieved only because false statements had been inserted into his Officer Efficiency Report and a biased promotion selection board had been empaneled. Compl. ¶¶ 17-29. *See* Pet. for Cert. at 6-7. Walsh spent the remainder of 1982 seeking to have the Governor of Delaware and the Secretary of the Army intervene to give him the commission and to generally investigate the Delaware National Guard. Neither official found reason to grant the relief Walsh requested. In the meantime, in August 1982, Walsh was transferred to the "retired reserve." Compl. ¶ 38.

4. In May 1983, Walsh asked the United States Department of the Army's Board for Correction of Military Records (ABCMR) to exercise its review powers to look into his failure to be promoted to the Deputy Commander position. Compl. ¶ 56. *See* 10 U.S.C. § 1552(a) (1988). On October 12, 1983, the ABCMR, without holding a formal hearing, denied his application. Walsh's Rsp. in Opp. to Defs.' Motion to Dismiss, Exh. J ("App. F"). *See* 32 C.F.R. § 581.3(c)(5)(ii), (iv) (1993). Walsh persisted. Twice more in the following years, the ABCMR denied his requests to revisit the events, each time finding that the information and arguments he had submitted did not warrant any alteration of the original decision. App. F. *See* 32 C.F.R. § 581.3(c)(5)(iii), (iv) (1993). So, too, the staff of the ABCMR rejected additional requests for reconsideration submitted by Walsh. App. F. *See* 32 C.F.R. § 581.3(c)(5)(iii) (1993).

5. As Walsh, over the years, continued to press his complaints to state and federal elected officials, a new Adjutant General had been appointed. In 1989, the new Adjutant undertook an inquiry into whether the retired

Walsh, then 59 years old, could be reinstated as an active general officer. However, the Adjutant learned that, in light of Walsh's age and because of the intervening period of retired status, governing congressional enactments and federal Army regulations precluded Walsh from obtaining the necessary promotions to a Brigadier and then possibly Major General. Because Brigadiers must retire at age 60 and because a year of active service must precede a promotion to that rank, there was simply not enough time for Walsh to accrue the needed year of preceding active service before he reached the mandatory retirement age. *See* 10 U.S.C. §§ 3364(e), 3843(b) (1988). On May 23, 1989, the new Adjutant General informed Walsh of the impossibility of him returning to active service. Compl. ¶¶ 91, 98. *See* Pet. for Cert. at 9.

6. In November 1989, Walsh filed a complaint with the Equal Employment Opportunity Commission. He charged that the Adjutant's conclusion – that Walsh, at age 59, could not be reactivated and promoted – constituted a violation of the Age Discrimination Employment Act, 29 U.S.C. §§ 621-34 (1988). Two months later, the EEOC notified Walsh that it would not proceed further because the ADEA does not apply to uniformed members of the armed services. Compl. ¶ 100.

7. Walsh then again sought help from his Congressional delegation. An inquiry from Senator Joseph Biden engendered a response from the ABCMR, delivered in October or November 1990. That correspondence summarized both the Board's denial, seven years before, of Walsh's initial application to it and the ensuing rejections of several requests for reconsideration. It suggested that the Senator should emphasize to Walsh that "he has

exhausted his opportunity for relief with the Army's administrative appeals system," so that "[h]is only recourse now is in a federal court of competent jurisdiction." Compl. ¶ 102; Walsh's Rsp. in Opp. to Defs.' Motion to Dismiss, Exh. J (App. F).

8. Eighteen months passed. Then on May 22, 1992, Walsh filed a complaint in the United States District Court for the District of Delaware. Invoking 42 U.S.C. §§ 1983, 1985, and 1986, Walsh alleged in five causes of action that the denial of the promotion in 1982 and the later continuous refusal to reinstate him violated constitutional due process as well as applicable army and Delaware National Guard regulations. Compl. ¶¶ 1-5; Pet. App. C-5 to C-6. In a sixth cause, Walsh claimed that the Guard's inability to "reactivate" and promote him in 1989 (because his age prevented him from being able to accrue the necessary pre-promotion time) constituted age discrimination actionable under the ADEA. Compl. ¶ 6; Pet. App. C-7. Named as defendants were Michael N. Castle, who was then Governor, the Military Department of Delaware, and the State itself. Because, by then, Walsh had reached the age of 62, he did not request reinstatement. Instead he asked for lost back pay in the amount of $130,000 and lost future retirement benefits in the amount of $175,000. Compl. at 50-51.

9. All the defendants moved to dismiss, arguing that they all enjoyed Eleventh Amendment immunity and that Walsh's entry into federal court had come much too late. The district court accepted the latter defense. It ruled that counts one through five (the civil rights claims) were governed by the borrowed Delaware statute requiring personal injury actions to be commenced within two

years after the injury. Applying that statute, the court held that because more than two years had intervened between the filing of the action and both Walsh's 1982 retirement and the 1989 notification that Walsh would not be reinstated, all the civil rights causes were time-barred. Pet. App. at C-5 to C-7. Turning to the age discrimination claim, the court, applying the then-current time limits in the ADEA, held this cause had also been filed beyond the limitation period. Walsh had not commenced his action within ninety days after being turned down by the EEOC in 1990. Pet. App. C-7 to C-8. *See* 29 U.S.C. § 626(e) (Supp. IV 1992). Walsh moved for reconsideration, arguing that the court should have used the two- and three-year limitation periods incorporated into the ADEA prior to its amendment in 1991. *See* 29 U.S.C. § 626(e)(1) (1988) (incorporating 29 U.S.C. § 255(a)) (Pet. Cert. at 3-4). He further claimed that the time for filing his civil rights claims had been tolled while he had been seeking administrative review before the ABCMR. The district court accepted Walsh's contention that the pre-1991 limitation periods should apply to his ADEA claim, but it held that his action was still not timely under these older constraints. Pet. App. B-8 to B-9. Turning to Walsh's tolling argument, the court ruled that, because exhaustion of administrative remedies is generally not required prior to instituting a civil rights action in federal court, Walsh had failed to establish "that the National Guard's appeals system impacted in any way Plaintiff's time for filing his civil rights complaint in federal court." Pet. App. B-7 to B-8. It thus reaffirmed its dismissal of the entire complaint.

10. On appeal, the court of appeals affirmed by judgment order, Pet. App. D-1 to D-2, and thereafter rebuffed Walsh's later requests for panel or *en banc* rehearing. Pet. App. A-1 to A-2. Walsh then filed a timely petition asking this Court for review.

REASON FOR DENYING THE PETITION

BECAUSE IT IS NOT CLEAR THAT PETITIONER WOULD BENEFIT FROM THE RULE HE SEEKS, THERE IS NO REASON TO GRANT REVIEW.

1. The Civil Rights Claims

In five causes in his 1992 suit, Walsh claimed that his failure to be promoted in 1982 had come about in a way which violated constitutional due process as well as governing military regulations. Such violations, he claimed, not only had prevented him from becoming a Brigadier General but had doomed him to reassignment to the retired reserve that same year. In the court of appeals, these causes, premised on the several civil rights statutes, were, under well-settled precedents, pre-ordained to dismissal as time-barred. Under the "borrowed" Delaware personal injury statute of limitation, Walsh had two years after the injury to file his action. Del. C. Ann. tit. 10, § 8119 (1975). Generally, the clock would have begun to run in April 1982, when Walsh was informed he was no longer being considered for the general officer slot and thus would face mandatory transfer to the retired reserve within months. *See Chardon v. Fernandez*, 454 U.S. 6, 6-8 (1981) (*per curiam*). Delaware law also would not postpone the limitations period or suspend the clock while

Walsh pursued related relief. *Marker v. Talley*, 502 A.2d 972, 977 (Del. Super. 1985). *See Board of Regents v. Tomanio*, 446 U.S. 478, 483-92 (1980). The Court of Appeals for the Third Circuit has also decided that a state national guardsman, like Walsh, challenging a promotion decision, may ask a federal court to grant injunctive relief such as reinstatement (and presumably back pay) without first seeking administrative relief before the appropriate service's review board. *See Jorden v. National Guard Bureau*, 799 F.2d 99, 102 n. 5 (3rd Cir. 1986), *cert. denied*, 484 U.S. 815 (1987). Thus, without the need to exhaust those intra-service remedies, there would be no compelling federal interest which would require reformulating the applicable state limitation period to take into account any time which the military review process might consume. *Accord Wright v. United States*, 19 Ct. Cl. 779, 783-85 (1990) (because resort to military review board is "permissive," six-year limitation period under 28 U.S.C. § 2401 is neither delayed nor tolled for such review process); *Hurick v. Lehman*, 782 F.2d 984, 987 (Fed. Cir. 1986) (same). Accordingly, Walsh's 1992 action, filed ten years after the promotion decision, came eight years too late.

By his petition, Walsh asks this Court to create a federal rule to change the limitation periods for judicial actions filed by "federally recognized" national guard personnel seeking to challenge enlistment, demotion, and promotion decisions made at the local state level. He proposes that the time period for instituting suit involving those situations should not begin to run until a military review board has rendered its decision, or, as an alternative, that the applicable limitation period should be tolled while the matter is pending before such board.

To support his rule, Walsh looks to language in opinions by other courts of appeals that suggest that before "federally recognized" guardsmen can ask the federal court to consider intervening in military personnel decisions, they must have presented their complaints about promotions and demotions to the military services' review boards, such as the ABCMR. *See, e.g., Williams v. Wilson*, 762 F.2d 357, 359-60 (4th Cir. 1985); *Penagaricano v. Llenza*, 747 F.2d 55, 57 (1st Cir. 1984), *overruled in main in Wright v. Park*, 5 F.3d 586, 590-91 (1st Cir. 1993). In so doing, those courts have recognized that a federal review board cannot order direct relief (such as reinstatement or promotion) within the state national guard component. But they have surmised that the administrative route may provide balm within the realm of the guardsman's status as a "federally recognized" officer. Thus, if the review board would "overrule" the local decision, the guardsman might be able to walk his "corrected" federal status into a position in a guard unit in another state or into a federal ready reserve unit. *Penagaricano*, 747 F.2d at 57. A decision by a federal board that the local decision violated applicable federal military rules may also exert pressure on the state commanders to rethink their decision. *Navas v. Gonzalez Vales*, 752 F.2d 765, 770 (1st Cir. 1985); *Sanders v. McCrady*, 537 F.2d 1199, 1200 n. 3 (4th Cir. 1976). In both scenarios, there might not be any need for any eventual federal judicial involvement. Walsh posits that if such an exhaustion requirement serves important goals, then the limitations periods for bringing court actions challenging such

military decisions should be restructured to take cognizance of the time spent before such boards.[2]

A rule which requires a "federally recognized" state guardsman to seek relief before a military review board before filing suit over a personnel decision may be a good one. A better rule might be that an appeal to such a review board is the only forum for relief, with judicial intervention being limited to ensuring that the board's decision was neither arbitrary nor capricious. *See Chappell v. Wallace*, 462 U.S. 296, 302-04 (1983); *Watson v. Arkansas National Guard*, 886 F.2d 1004, 1008-11 (8th Cir. 1989). *Cf. Knutson v. Wisconsin Air National Guard*, 995 F.2d 765, 770-71 (7th Cir. 1993). But this matter is not the vehicle for this Court to examine the interrelated and tangled questions of exhaustion, the scope of judicial deference to military decisionmaking, and the calculation of the length of any applicable limitations period. The civil rights claims asserted by Walsh would not survive even under any variation of the rule he proposes. To make his civil rights causes timely under the borrowed two-year statute of limitations, Walsh dates the end of ABCMR review as mid-November 1990, Pet. for Cert. at 10-11, 19, relying on a letter Senator Biden received from the ABCMR. That 1990 correspondence summarized the Board's *past* decisions on Walsh's initial appeal and his later requests for reconsideration. It reported that Walsh's initial request for review was denied in 1983 and that his later applications to reopen were also rejected over the ensuing years.

---

[2] Of course, the same courts, after requiring exhaustion, have in most instances found the underlying military dispute non-amenable to federal court scrutiny.

Walsh's Rsp. in Opp. to Defs.' Motion to Dismiss, Exh. J (App. F). Initially, that explanatory letter could hardly be viewed as the formal "final judgment" by the administrative board, with all the mentioned prior decisions being merely interlocutory rulings. By regulation, the ABCMR had to notify Walsh of its earlier denials, noting the grounds for the decision. 32 C.F.R. § 581.3(c)(5)(iv)-(vi) (1993). Those notices, not a letter to a Senator, should count as the trigger for any permitted follow-up federal court action. Secondly, a rule keying the limitations period to exhaustion cannot be expanded into one where each later request for reconsideration can be used to start a brand new limitation period for filing suit to challenge (via a full-blown court proceeding) the original hiring, firing, or promotion decision. Such an expansion would render any limitation period meaningless.

Of course, if, as indicated in the ABCMR's 1990 letter to Senator Biden, the ABCMR had duly and repeatedly rejected Walsh's claim years earlier, then the clock on the limitation period had begun to run many years before 1992. If so, even if Walsh would have been entitled to a new full two-year period at the end of the ABCMR review to file suit, his 1992 action still came several years late. As the proponent of suspension or tolling, Walsh had the obligation to establish as a matter of law (either federal or state) that he had not slept on his rights. The facts he has presented simply do not leave a clear enough picture to determine whether, even under his theory of tolling during the administrative review, his lawsuit was timely.

2. The ADEA Claim

In his May 1992 suit, Walsh also complained that the new Adjutant General had violated the ADEA when he announced to Walsh, on May 23, 1989, that the Delaware Guard could not then reactivate Walsh because Walsh's age did not allow enough time for the required year of active service needed before he could be elevated to an active Brigadier General rank. Compl. ¶¶ 91-94. To make his ADEA claim timely, Walsh, here and below, relied on the three-year filing window for "willful" violations as incorporated into the ADEA prior to its amendment in 1991. 29 U.S.C. § 626(e)(1) (1988) (incorporating 29 U.S.C. § 255(a) (1988)) (Pet. for Cert. at 3-4). However, at the same time, Walsh does not claim that the ADEA vitiated the profusion of "up or out" statutes Congress has enacted to govern the length of service at the various ranks in the military service. Indeed, he concedes that, in the best scenario, he could have been forced to leave active service in the National Guard when he reached the age of 62. Nor has he ever suggested that the new Adjutant General incorrectly interpreted the Congressional enactments and federal regulations when the Guard determined, in 1989, that Walsh could not be "reinstated" to active service. Instead, Walsh's claim is that, because he was improperly terminated in 1982, the Guard's failure, in 1989, to "waive" the statutory and regulatory service and age restrictions constituted a violation of ADEA. Yet, with such a theory, it is hard to brand the 1989 refusal as a "willful" violation of the ADEA, triggering the three-year, rather than the ordinary two-year, limitations period. Compliance with Congressional enactments and unchallenged army regulations hardly

bespeaks the type of intentional or callous behavior which would be needed to trigger the extended limitation period. *See McLaughlin v. Richmond Shoe Co.*, 486 U.S. 128, 133 (1988). Without the three-year window, Walsh's suit, filed beyond the ordinary two-year period, was untimely.

Moreover, Walsh's limitation argument is hardly one of importance. His claim that he should have access to a federal court relies on a limitation period which was altered before he filed suit. Finally, most courts have held that Congress did not intend that the ADEA reach to persons serving in the uniformed federal armed forces or in the state militias. *Frey v. State of California*, 982 F.2d 399, 402-04 (9th Cir. 1991); *Kawitt v. United States*, 842 F.2d 951, 953-54 (7th Cir. 1988); *Helm v. State of California*, 722 F.2d 507, 509 (9th Cir. 1983).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

CHARLES M. OBERLY, III
Attorney General of the
State of Delaware

GARY A. MYERS
Deputy Attorney General
Counsel of Record

Delaware Department of Justice
114 E. Market Street
Georgetown, DE 19947
(302) 856-5353

July 8, 1994

APPENDIX F

Walsh v. Castle, et. al., C.A. 92-298 (D. Del.), Plaintiff's Response in Opp. to Defendant's Motion to Dismiss, Exh. J. (Oct. 15, 1992)

DEPARTMENT OF THE ARMY
BOARD FOR CORRECTION OF MILITARY RECORDS
2ND FLOOR, 1941 JEFFERSON DAVIS HIGHWAY
ARLINGTON, VA 22202-4508

SFMR-RBR
WALSH, RICHARD M.
226-16-6699

Honorable Joseph R. Biden, Jr.
United States Senate
Washington, D. C. 20510

Dear Senator Biden:

This is in response to your letter of 26 September 1990 to the Honorable Richard L. Armitage, former Defense Assistant Secretary (International Security Affairs) concerning Mr. Richard M. Walsh's efforts to have his military records corrected. Your letter was referred here as a matter more properly for consideration by the Department of the Army, and more specifically by this Board.

Mr. Walsh's original application to this Board was denied without a formal hearing pursuant to the Board's governing regulation on 12 October 1983. He had asked, essentially, that his records be corrected by deleting allegedly unjust entries in an officer efficiency report, and by reinstating him in the Army National Guard. Subsequent requests for reconsideration were considered and

denied by the Board on at least two occasions in the intervening years. On each of those occasions he was informed that the new information and new contentions submitted did not warrant a reversal of the Board's original decision. Other requests for reconsideration were determined not to amount to new evidence, and were denied by the staff of the Board during the same period, in accordance with the governing regulation.

He indicated in his letter to you of 18 September 1990 that he had included "conclusive and irrefutable facts in the two enclosed affidavits," which, I presume, he feels supports a reversal of the Board's denial of his application. I have reviewed those enclosures and conclude that they are nothing more than his own notarized statements embellishing his original contentions. While he also has apparently obtained certain information from the Department under the Freedom of Information Act, which allegedly substantiates some kind of a "coverup" within the Department, I found nothing in his letter to you or in the enclosures which would warrant resubmitting his case to the Board.

Mr. Walsh should be advised that he has exhausted his opportunity for relief within the Army's administrative appeals system. His only recourse now is in a federal court of competent jurisdiction.

I hope this information has been helpful and I am sorry my response could not be favorable.

Sincerely,

(signed) David R. Kinneer

David R. Kinneer
Executive Secretary

---

(3)

SUPREME COURT, U.S.
FILED
AUG 26 1994
OFFICE OF THE CLERK

NO. 93 - 1441

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

RICHARD M. WALSH,

PETITIONER,

v.

STATE OF DELAWARE,
MICHAEL N. CASTLE AND THE
DEPARTMENT OF MILITARY
AFFAIRS,

RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

RICHARD M. WALSH, PRO SE
2209 PENNINGTON DRIVE
WILMINGTON, DE 19810
(302) 475-3697

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	(ii)
REFUTATION OF REASON FOR DENYING PETITION	1
BENCH MARK ESTABLISHING EXHAUSTION DATE OF 3 DECEMBER 1990	4
REFUTATION OF ADEA CLAIM CHALLENGE	8
OTHER MISINFORMATION IN RESPONDENTS' BRIEF IN OPPOSITION	15
CONCLUSION	20
APPENDIX	21

APPENDIX A : ABCMR letter to Walsh (12 Mar 86)

APPENDIX B : Sen. Roth's ltr. to Sec. of Army (10 Jun 88)

APPENDIX C : Nov. 1986 "Blue Book" Table of Contents

APPENDIX D : Sen. Biden's ltr. to Walsh (3 Dec 90)

APPENDIX E : Nature of the Case, pg. 1 (Extract fr. Reply Brief of Appellant)

TABLE OF AUTHORITIES

CASES	Pages
Dillard v. Brown, 652 F.2d 316 (1981)	14
Jorden v. National Guard Bureau, 799 F.2d 99 (3rd Cir 1986)	2, 3, 14
Karr v. Carper, U.S. Dist. Ct., Dist. of Delaware CA 88-466 MMS Unreported Opinion (31 March 1993)	2, 3, 4
McLaughlin v. Richland Shoe Co., 486 U.S. 128 (1988)	12
Navas v. Vales, 752 F.2d 765 (1985)	19
Simpson v. United States, 467 F.Supp. 1122 (1979)	14, 19

STATUTES AND REGULATIONS	Pages
Age Discrimination Employment Act, 29 U.S.C. 621-34 (1988)	8, 9, 10, 12, 13, 14
Reserve Officer Personnel Act of 1954, 68 STAT. 1147 as amended	13, 18
32 U.S.C. 307 (a) (2)	18
National Guard Reg. 635-102	19

REFUTATION OF REASON FOR DENYING PETITION

1. Contrary to Respondents' "Reason for Denying the Petition" (Res.' Brief in Opp. at 7) and Respondents' statement (at 8, last para.) that "By his petition Walsh asks this Court to create a federal rule to change the limitation periods for judicial actions --," a statement for which there is no basis in record or in fact, Walsh neither seeks nor asks this Court to create any such rule. Rather, Walsh asks only that this Court require that the already existing exhaustion policy of the U.S. Court of Appeals for the Third Circuit be adhered to and applied in the present case in a manner consistent with its definition and its application in previous Third Circuit cases. (see Pet. for Cert. at 25-31).

a. Respondents' only "Reason for Denying the Petition" clearly deviates from any factual basis by its very premise of likening Jorden to Walsh (Res.' Brief in

Opp. at 8). In doing so, Respondents incorrectly likened a full-time Guard employee in a civilian technician program under state control (Jorden) to a part-time citizen-soldier under no such state controlled program (Walsh) and therefore simply, but incorrectly, concluded that, since Jorden was not required to exhaust federal administrative remedies, Walsh would likewise not be required to do so, based on Jorden v. National Guard Bureau, 799 F.2nd 99, 102 n. 5 (3rd Cir. 1986), cert. denied, 484 U.S. 815 (1987).

b. It is apparent from Karr v. Carper, U.S. Dist. Court, Dist. of Delaware, CA 88-466 MMS, Unreported Opinion (31 March 1993), that both the Res.' above analogy and conclusion are incorrect because the Delaware Department of Justice (DE/DOJ), which represents both the Defendants in the Karr case and the Respondents in the present case, is out of sync with the current Third

Circuit exhaustion policy (see Pet. for Cert. at 25-27, para. (1)-(1)(c)).

(1) This is clearly demonstrated by DE/DOJ's recent flip-flop in its position on the exhaustion issue (to the wrong side each time) from that of exhaustion being required in the Karr case, in which the Dist. Court ruled against DE/DOJ (see Pet. at 27-29, para. (1) with Note), to that of exhaustion not being required in the present case, in which the lower Courts should have again ruled against DE/DOJ in accordance with the Third Circuit's own exhaustion policy because the "overriding characteristic of state control" was reversed between those two cases from being present in Karr, as it was in Jorden where the court ruling was therefore consistent with Karr, to being absent in the present case (see Pet. at 29-31, para. (b),(c) with Note); thus, making the DE/DOJ's flip-flopped position of exhaustion not being

required in the present case once again out of sync with Third Circuit law and therefore incorrect.

c. DE/DOJ's flip-flopped and out of sync positions on exhaustion in Karr and Walsh are apparently due either to opposite defense strategy requirements in each case or to an error of apprehension regarding the critical importance either the absence or presence of "state control" plays in first determining the "adequacy of the remedy the (federal) administrative process could potentially supply" which in turn determines whether or not exhaustion is required under current Third Circuit law (see Pet. at 15-17, para. 9. a., b., c.).

BENCH MARK ESTABLISHING EXHAUSTION DATE OF 3 DECEMBER 1990

2. Regarding Res.' Brief in Opp. at 4, para. 7; at 10, last 2 sentences: Respondents stated incorrectly that the est. Nov 90 ABCMR correspondence "reported that Walsh's

initial request for review was denied in 1983 and that his later applications to reopen were also rejected over the ensuing years," and therefore concluded incorrectly (at 11) that Walsh had in effect also been notified each time that he had exhausted the Army's administrative appeals system.

a. Contrary to Respondents' statement, however, two applications to reopen were approved for reconsideration by the ABCMR based on new evidence of wrongdoing and cover-up within the Dept. of the Army (DA). A 12 Mar 86 letter from the ABCMR to Walsh with a copy to Senator Biden (App. A) shows that the second of the two took place in 1986 (the first in 1984) and officially notified Walsh and Biden of the Board's decision not to reverse and the grounds for it; but, again contrary to Respondents' contention, there was no notice, no mention at all of having exhausted the Army's administrative appeals system and none

subsequently until the undated (est. Nov 90) ABCMR letter received by Walsh under Senator Biden's 3 Dec 90 advisory letter, see below.

(1) Other requests for reconsideration were subsequently filed based on false evidence having been found in the ABCMR's 1986 Memorandum of Consideration on which the Board's denial was based, but were stonewalled by the staff of the Board. An appeal was then made on 10 Jun 88 to the Secretary of the Army on Walsh's behalf by Senator Roth (during Senator Biden's long recovery from a cerebral aneurysm) which was never answered directly but instead, after long delays and several follow-ups, was apparently routed back to the ABCMR where it, along with Senator Biden's 26 Sep 90 letter, were simply disposed of by the 3 Dec 90 exhaustion notice to Walsh (see para. b. below) without the ABCMR or its staff ever checking and verifying the new evidence of DA cover-up which Senator Biden had

requested, or even attempting to refute the allegations of DAIG and ABCMR use of false evidence to cover-up the alleged wrongdoing as had been specifically requested in Senator Roth's 10 June 1988 letter (please see Compl. para. 80; App. B; App. C-2, 3, CF VI, VII).

b. Pursuant to the undated (est Nov 90) ABCMR letter (Res.' Brief in Opp., App. F), Senator Biden, in his 3 Dec 90 letter (App. D), enclosed a copy of the ABCMR letter which stated, at F-2, last para:

> "Mr. Walsh should be advised that he has exhausted his opportunity for relief within the Army's administrative appeals system. His only recourse now (Nov 90) is in a federal court of competent jurisdiction." Senator Biden's letter then advised Walsh that, "At this point (3 Dec 90), the only way to pursue your corrections of military records is through a Federal Court."

(1) Recognizing that he too was being put on notice for the first time in this matter, Senator Biden further advised Walsh as follows:

> "Under separation of powers, I am not permitted to become involved in matters of the court. If you have further questions about other matters pertaining to the federal government, please do not hesitate to contact my office."

d. Finally, Senator Biden has been addressee on or sent a copy of all ABCMR correspondence in this matter and, as demonstrated in his 3 Dec 90 letter to Walsh (para. (1) above), would have notified Walsh of the separation of powers restriction on him and therefore distanced himself from Walsh regarding any further contacts on this matter had there been an earlier notification of exhaustion. Therefore, Senator Biden's 3 Dec 90 letter to Walsh is the true and accurate bench mark for when Walsh's opportunity for relief within the Army's administrative appeals system was in fact officially exhausted.

REFUTATION OF ADEA CLAIM CHALLENGE

3. Regarding Res.' Brief in Opp. at 12-13:

a. Respondents' ADEA "theory" at 12 is

invalid because it is based on two incorrect statements.

(1) Contrary to Respondents' statement, Walsh actually complained that Governor Castle and key advisors (Chief of Staff, Legal Counsel and new Adjutant General) had willfully violated the ADEA (Compl. para. 91) when, responding for Governor Castle to Walsh's 6 Mar 89 and 4 May 89 follow-up letters to the Governor, AG Episcopo's 23 May 89 letter falsely stated that every avenue available for Walsh's reinstatement had been exhausted and that there is nothing further that "can" be done, which the Governor and his advisors knew was not true from Walsh's 6 Mar 89 and subsequent letters, wherein Castle had been advised of the availability of a Federal waiver obtainable through the Office of Senator Roth. Instead, however, Governor Castle's later refusal to simply request the Federal waiver when Senator Roth inquired

about it on Walsh's behalf only further confirms that violation of the ADEA was willful. (see Appellant's Reply Brief, No. 93-7421, pgs. 6-8, para. 2.c.; Compl. para. 91-98).

(2) Again contrary to Respondents' statement, except for Governor Castle having prolonged the cover-up of the 1982 wrongdoing, Walsh claimed no tie between his improper termination in 1982 and Governor Castle's ultimate failure to request an age waiver in 1989, the latter being clearly distinguished as a separate event in Walsh's Cause of Action 6 at Complaint page 6; whereas, Walsh's actual ADEA claim is that, because Governor Castle entrapped himself in the cover-up of his predecessor's alleged wrongdoing (Compl. para. 74) and knew that the "Blue Book" documentation irrefutably substantiating the 1982 alleged wrongdoing and its subsequent

cover-up would be a serious political embarrassment to himself during the Federal Recognition Board hearing necessary to re-instate Walsh (Compl. para. 61, 70, 71; App. C), Castle proceeded ostensibly to review but actually to drag-out an unnecessary re-review of the "Blue Book" (Compl. para. 63, 75, 81 - 83) until Walsh's 59th birthday on 6 Oct 88 so that when pressed later by Walsh for reinstatement (Compl. para. 89, 90) he could simply announce that all avenues to accomplish Walsh's otherwise fully justified reinstatement had been exhausted and nothing further can be done because Walsh is now over 59 years of age (Compl. para. 91); whereas, neither statement was true and Governor Castle knew that. (see para. 3.a.(1) above).

b. Based on actual facts rather than Respondents' unfounded "theory," the above actions and deceit by the highest elected official in the State of Delaware for no

reason other than to avoid political embarrassment to himself, all of which Respondents' "theory" failed to recognize or even consider, can only be characterized as nothing less than willful age discrimination for purely personal and political purposes and, therefore, indeed "bespeaks the type of intentional or callous behavior" Respondents claim would be needed to trigger the three-year rather than two-year limitations period.

(1) Therefore, Walsh's claim that the alleged ADEA violation was willful fully meets the "correct standard" adopted by the U.S. Court of Appeals for the Third Circuit and affirmed by the U.S. Supreme Court in,

> McLaughlin v. Richland Shoe Co., 486 U.S. 128, "Summary" (1988), by which, "an employer's violation is not willful unless the employer knew or showed reckless disregard for the matter of whether its conduct was prohibited by the Act."

(2) However, when the District Court applied the appropriate three year

statute of limitations to the period between the undisputed accrual date of 23 May 1989 and filing date of 22 May 1992, an arithmetic error was apparently made which caused the Court to incorrectly conclude that Walsh's willful age discrimination action "would still be time barred." (see Pet. for Cert. pgs. 32-34, para. 2.).

c. Finally, when Respondents stated that "most courts have held that Congress did not intend that ADEA reach to persons serving in the uniformed federal armed forces or in the state militias," they failed to also point out that it was done in the context of "bona fide military personnel actions," primarily under the attritive provisions of the Reserve Officer Personnel Act (as in the cases cited by Respondents) which are constitutional and which the ADEA therefore does not cover. Also,

> "The ADEA and Reserve Officer Personnel Act can be reconciled, and effect given to the language and (congression-

> al) intent of both, by construing the term 'personnel actions' as used in the ADEA, narrowly." (See Simpson v. United States, 467 F. Supp. 1122, 1128 (1979).

(1) In addition, the U.S. Court of Appeals for the Third Circuit has held,

> "If the military justification outweighs the infringement of the Plaintiff's individual freedom, we may hold for the military on the merits, but will not find the claim to be non-justiciable and therefore not cognizable by a court." Dillard v. Brown, 652 F.2nd 316, 323 (3rd Cir. 1981); Jorden v. National Guard Bureau, 799 F.2nd 99, 102 n. 5 (3rd Cir. 1986), cert. denied, 484 U.S. 815 (1987).

(2) It is clear from the nature of the present case that it involves absolutely no "bona fide military personnel actions," but rather, the willful violation by three elected or politically appointed State officials of statutes and regulations as well as the intent of Congress for personal and political purposes. (See Appellant's Reply Brief, pg 1, para. 1-2 (App. E), pgs. 2-8, para. a.- c.; Compl. para. 6-10, 49).

OTHER MISINFORMATION IN RESPONDENT'S BRIEF IN OPPOSITION

4. Contrary to Respondents' "Counter-Statement of the Case" (at 2-3, para. 3.) and substantiated by the evidence validated by then Governor Castle's legal staff (Compl. para. 61, 81-83; App C):

a. As Adjutant General, Lank was custodian of all Del. Nat. Guard personnel records and therefore had prior (not "later determined" as stated by Respondents) direct personal knowledge before selecting his long time friend and college fraternity brother, Colonel Trivits, for the "federally recognized" Deputy Commanding General position in the 261st Signal Command (DCG/261) that Trivits was "actually medically unacceptable for retention in the Army National Guard in accordance with regulations" which was later only "reaffirmed" to Lank by the National Guard Bureau. (Compl. para. 40-42: App C-1, 2, CF

III, IV).

b. The above act of "political cronyism" was actually achieved not by the aborted OER attempt to discredit Walsh, but rather by the deliberate manipulation of the regulated officer selection and promotion process and the willful violation of Federal and State statutes and regulations governing the promotion and discharge of National Guard officers which wrongfully and 9 years prematurely terminated his otherwise rising military career. (Compl. para. 23; para. 5.a. below; Compl. para. 15; App. C-2, CF V).

c. Governor duPont and Secretary of the Army Marsh had been given sufficient, unrefuted, substantiating evidence on which to find reason to grant the relief Walsh requested. However, duPont, in order to avoid political embarrassment, first refused to get involved and later provided false information on which to base his denial

(Compl. para. 30-31, 44-47, 51; App C-1, CF I); while the Army refused to grant requested relief based on later-proven false and misleading evidence in the Army's Report of Investigation as well as suppressed legitimate evidence withheld from the IG and the Army Vice Chief of Staff at the time they acted on this case. (Compl. para. 32, 49, 10.d; App C-2, CF VI, VIII).

5. Respondents' portrayal (at 2, para. 2 & n.1) of Walsh in August 1982 as an officer with more than three decades of service entrenched at the top in the rank of Colonel for almost a half-decade and therefore ripe for termination under one of the "myriad of statutes" Congress has enacted to prevent such a situation is greatly overdone and grossly misleading; whereas, in reality Walsh had just received on 8 April 1982 the positive results of his annual review by the Selective Retention Board with an enthusiastic and mission oriented

endorsement from his boss, the Commanding General of the 261st Signal Command (Compl. para. 24-25), the position two steps higher for which the record clearly showed Walsh to have been "best qualified" in accordance with and required by all governing statutes and regulations (Compl. para. 4, 15, 20, 24-25), and to which he therefore had the highest probability to succeed in 1987 (Compl. para. 67-68) as he also had to be promoted to the DCG/261 position in 1982 absent the improper Lank/Trivits cronyism and its resulting deliberate violation of those statutes and regulations (ROPA (para. a. below); 32 U.S.C. 307 (a)(2); Compl. para. 15, 40-43), as well as the clearly stated intent of Congress (Compl. para. 103).

a. Respondents' misleading portrayal of Walsh actually distorts the primary purpose of the Reserve Officer Personnel Act of 1954 which governs the promotion and

discharge of National Guard officers. Briefly, to ensure that military personnel meet proper standards through a system for merit promotion based on regular review of each officer's performance and qualifications and, by means of its attritive provisions, to provide adequate promotion opportunities for qualified officers. Simpson v. United States, 467 F. Supp. 1122, 1124 (1979). Pursuant to which, NGR 635-102 requires that a Selective Retention Board consider yearly whether or not each officer with 20 or more years of commissioned service should be retained in the National Guard based on a review of each officer's demonstrated performance and potential, latest medical examination, and other factors for assuring a viable combat ready military unit in future years. Navas v. Vales, 752 F.2d 765,767 (1985).

b. Respondents also failed to recognize the significance in the present

case of the above stated purpose and requirements under the ROPA and, therefore, also failed to consider (1) the simple question: How then, under such a law, was Walsh, the "best qualified" officer for promotion to the DCG/261 position, moved out instead of up; whereas, Trivits, both medically and professionally unqualified for the promotion and "actually medically unacceptable for retention in the Army National Guard in accordance with regulations" (Compl. para. 40, 43), was moved up instead of out ?? and (2) the logical and rational answer: Political cronyism!!

CONCLUSION

The Petition for Writ of Certiorari should be granted for the reasons stated therein.

Date:

25 Aug 94

Respectfully submitted,

Richard M. Walsh

RICHARD M. WALSH, PRO SE
2209 Pennington Drive
Wilmington, DE 19810
(302) 475-3697

APPENDIX

APPENDIX A-1

DEPARTMENT OF THE ARMY
BOARD FOR CORRECTION OF MILITARY RECORDS
WASHINGTON, D.C. 20310-1803
12 MAR 1986

SFMR
WALSH, RICHARD M.
222-16-6699

Brigadier General Richard M. Walsh
Delaware Army National Guard (Retired)
2209 Pennington Drive
Wilmington, Delaware 19810

Dear General Walsh:

This is in reply to your request for reconsideration of your earlier applications for correction of military records.

Your request, the information you submitted, and your available records have been reconsidered by the Army Board for Correction of Military Records. It was determined that the new information and new contentions submitted in your request do not warrant a reversal of the Board's earlier decisions. Enclosed is a copy of the Memorandum of Consideration which explains why the Board reached this decision.

You are assured that this decision is the result of a thorough and impartial consideration of all the information available to the Board.

Sincerely

(s)

Karl Bielenberg
Executive Secretary

Enclosure
CF: Honorable Joseph R. Biden, Jr.

APPENDIX B-1

UNITED STATES SENATE
WILLIAM V. ROTH, JR.
WASHINGTON, D.C. 20510
JUNE 10, 1988

The Honorable John O. Marsh
Secretary of the Army
Pentagon, Room 3E718
Washington, D.C. 20310

Dear Mr. Secretary:

Enclosed is a copy of the March 30, 1988 letter to you from one of my constituents, Richard M. Walsh, requesting your personal attention and corrective action, to which he has not received a reply to date.

As stated in paragraph 3, it concerns two of the same problems, apparently still unresolved, that he had initially asked to be investigated and corrected back in June, 1982. At that time, I had assured him that his complaint would receive a fair hearing from appropriate Army officials, which I then requested of you in my July 16, 1982 letter, but which he contends was not done.

Instead, Mr. Walsh alleges in paragraph 5, that both the DAIG and the ABCMR covered up the initial problems by suppressing legitimate substantiating evidence and basing the conclusions of their respective reports of investigation on false evidence. He also contends that incontrovertible evidence of the coverups, obtained subsequently from the Department of the Army's own files through the Freedom of Information Act, was provided to both the DAIG and ABCMR, and finally to your office; but that it was never directly addressed, nor was it ever denied or refuted.

As you can see in paragraphs 14 and 15, Mr. Walsh presents the details of the two problems and their alleged coverups along with what he described as irrefutable substantiating evidence comprised of 18 Evidence Sheets consisting, with one exception (#10), of Department of the Army

reports, correspondence and publications.

I'm sure that you will agree that the allegations are very serious and are well documented, and that they must, therefore, be addressed directly and as quickly as possible in a fair hearing and impartial review of all the evidence presented. The documentation enclosed with the March 30, 1988 letter from General Walsh does appear to conclusively justify and fully warrant the corrective action he requests in paragraphs 2 and 18.

Therefore, if Mr. Walsh's allegations are incorrect then clear specific and legitimate refutation is warranted. I recommend and appreciate your attention at this critical juncture to see once and for all whether Mr. Walsh was given his fair shake.

Thank you for your cooperation.

Sincerely,

(s)
William V. Roth, Jr.
U.S. Senate

WVR:dmi

Attachments

APPENDIX C-1

NOVEMBER 1986
"BLUE BOOK"
TABLE OF CONTENTS

STATEMENT OF THE PROBLEM PAGE 1

FACTS RELEVANT TO THE PROBLEM PAGE 1

DISCUSSION OF RELEVANT FACTS PAGE 2 - 11

CONCLUSIONS PAGE 11

RECOMMENDATIONS FOR CORRECTIVE ACTION PAGE 12 - 13

CASE FILES I-IX(ALLEGATIONS AND EXHIBITS OF IRREFUTABLE SUBSTANTIATING EVIDENCE):

CASE FILE I, EXHIBITS A - F: Failure of the CINC/DNG, Governor duPont, to exercise proper Command & Control or to heed, investigate or respond to allegations of resultant cronyism and misconduct by TAG/DNG, MG Lank; and the subsequent participation by Governor duPont in a Department of the Army cover-up.

CASE FILE II, EXHIBITS A - G: Misuse and mismanagement of State funds by TAG/DNG.

CASE FILE III, EXHIBITS A - E: Improper selection and appointment by MG Lank of his

crony, Colonel Trivits, to a technically demanding general officer line unit position for which he was not qualified.

CASE FILE IV, EXHIBIT A: Improper retention by MG Lank of Colonel Trivits in the DEARNG after his removal from the general officer position to which TAG had improperly appointed him.

CASE FILE V, EXHIBITS A - F: Improper manipulation and stalling of the regulated DNG Officer Selection and Appointment Process by TAG, MG Lank, in order to wrongfully terminate the DNG career of the preeminently qualified candidate for the technically demanding general officer line unit position and clear the way for the improper appointment of his unqualified crony, Colonel Trivits (see Case File III).

CASE FILE VI, EXHIBITS A - K: Misuse and mismanagement of Federal training funds by TAG/DNG and its subsequent cover-up by the

Office of the Inspector General, Department of the Army.

CASE FILE VII, EXHIBITS A - N: Falsification of official DEARNG personnel records by TAG's Assistant AG (with TAG's knowledge) and its subsequent cover-up by the Army Board for Correction of Military Records, Department of the Army.

CASE FILE VIII, EXHIBITS A - D: Incomplete and misleading report by TAG/DNG which concealed official Army Training Evaluators' confirmation of a very serious technical training deficiency in the DEARNG negatively impacting its mission-readiness.

CASE FILE IX, EXHIBITS A - G: Misleading, deceitful and fraudulent letters from the Office of the Secretary of the Army abetting the DA cover-up.

APPENDIX D

UNITED STATES SENATE
JOSEPH R. BIDEN, JR.
DELAWARE
WASHINGTON, D.C. 20510

DECEMBER 3, 1990

Mr. Richard Walsh
2209 Pennington Drive
Wilmington, DE 19810

Dear Mr. Walsh:

Thank you for your patience while awaiting a response to the inquiry that was submitted to the Department of the Army with regard to your efforts to have your military records corrected.

I regret that the Department of the Army could not render a favorable decision in this matter. I have enclosed for you a copy of the correspondence that was submitted to my office.

At this point, the only way to pursue your corrections of military records is through a Federal Court. Under separation of powers, I am not permitted to become involved in matters of the court.

If you have any further questions about

other matters pertaining to the federal government, please do not hesitate to contact my office.

Sincerely,

(s)
Joseph R. Biden, Jr.
United States Senator

APPENDIX E-1

[EXTRACT FROM REPLY BRIEF OF APPELLANT, PAGE 1]

NATURE OF THE CASE

1. Appellees incorrectly stated portions of the Nature of the Case at page 3. Appellant (Walsh) actually challenges three decisions not two; none of which was a bona fide military decision in nature nor served any constructive military purpose despite what describing them as "uniformed" attempts to infer.

2. To the contrary, each of the three challenged decisions was political and/or personal in nature and also are alleged to have been in violation of statutes and/or regulations. Each was made by an elected or politically appointed State Official clearly to serve only his own personal, not military, interests and purposes without any regard for the damaging consequences and greater wartime risks it imposed upon the many uniformed personnel directly and indirectly impacted, and upon the overall

military mission capabilities of the United States in which the Delaware Army National Guard (DEARNG) played a key role under the total force concept.